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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 63.

THOMAS M. KEENER, ADMINISTRATOR OF EDWIN KEENER, DECEASED, PLAINTIFF IN ERROR,

vs.

LA GRANGE MILLS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

FILED JULY 21, 1911.

(22,812)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 20, 1913.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of Georgia, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said case before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Thomas M. Kener, Administrator of Edwin Kener, deceased, and La Grange Mills, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or a commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Thomas M. Kener, Administrator, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ,
2 so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court, the 4th day of April, in the year of our Lord one thousand nine hundred and eleven.

[Seal U. S. Circuit Court, N. D. Georgia.]

O. C. FULLER,
Clerk of the Circuit Court of the United States
for the Northern District of Georgia.

April 4, 1911.

Allowed by:
WM. H. FISH,
Chief Justice of the Supreme Court
of the State of Georgia.

Filed in office Ap'l 6, 1911.
Z. D. HARRISON, *C. S. C. Ga.*

3 UNITED STATES OF AMERICA, *ss:*

To La Grange Mills, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Georgia, wherein Thomas M. Kener, Administrator of Edwin Kener, deceased, is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against said Plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William H. Fish, Chief Justice of the Supreme Court of Georgia, this 4 day of April, in the year of our Lord one thousand nine hundred and eleven.

WM. H. FISH,
Chief Justice of the Supreme Court of the State of Georgia.

Copy of the within citation received this — day of April, A. D. 1911, and all further service and notice waived.

Attorneys for La Grange Mills, Defendant in Error.

Filed in office Ap'l 8, 1911.
Z. D. HARRISON, *C. S. C. Ga.*

4 STATE OF GEORGIA,
County of Fulton:

THOS. M. KENER, Adm'r of EDWIN KENER,
vs.
LA GRANGE MILLS.

Writ of Error from S. Court of Geo. to U. S. Supreme Court.

Personally appeared before the undersigned W. H. Terrell, who being first duly sworn, on oath says that he is attorney at law for the plaintiff in the above stated case, and that on Saturday, April 29th, A. D. 1911, in the city of La Grange Georgia, he served F. M. Longley, Esq., Attorney of Record for La Grange Mills, and J. M. Barnard, the agent of said La Grange Mills in charge of the property of said La Grange Mills at La Grange, Geo., each personally with a true and correct copy of the within and foregoing citation.

W. H. TERRELL.

Sworn to and subscribed before me this May 1, 1911.

Z. D. HARRISON,
Clerk Supreme Court of Ga.

5 F. M. Longley, Attorney at Law.

La Grange, Ga., *Ap'l* 6, 1911.

Col. W. H. Terrell, Atlanta.

Dear Mr. Terrell: I have your letter of the 5th with citation in relation to writ of error in Kener vs. La Grange Mills to Supreme Court of the U. S. and in reply beg to say that I have rendered all the services I contracted to render in this case and have, after some controversy, settled in full with the Company and no longer represent the corporation, and presume I will not in the future as I am taking no new cases, and will quit the practice as soon as I wind up some litigation I now have on hand. The weight of 72 years on my shoulders is heavy enough, without adding thereto the strife of contending litigants. The officers of the La Grange Mills all live, in so far as I know in Baltimore. John M. Barnard of La Grange I think looks after their property here, but will make no contract or take any responsibility, referring all such matters to his superiors at Baltimore. I am sorry I have no power or authority in this matter. I am no longer attorney for the company and have no authority to further represent it, and if I attempted to do so, might find
6 my acts repudiated—especially after the controversy over my fee in this case. At any rate I will not take the risk. I will gladly give you all the information I can that will enable you to preserve the rights of your client, but I am done with the case.

Cordially yours,

F. M. LONGLEY.

Thomas M. Kener, Administrator,
vs.
La Grange Mills.

Georgia.
Fulton County:

Personally appeared before the undersigned W. H. Terrell, attorney for the plaintiff in Error in the above stated case who, being first duly sworn on oath says that he sent to F. M. Longley, Esq., attorney of record for the La Grange Mills, at La Grange, Georgia, the original citation hereto attached together with a true and correct copy of the same. That the same was sent by him to the said Longley through the United States Mail with the request that he acknowledge service thereon. That the said Longley kept the copy of said citation and returned the original hereto attached to affiant together with the within and foregoing letter which was received by affiant in due course of mail on this date.

W. H. TERRELL.

Sworn to and subscribed before me this April 7th, 1911.

[Seal of J. A. Branch, Notary Public, Fulton County, Ga.]

J. A. BRANCH,
Notary Public, Fulton Co., Ga.

7 UNITED STATES OF AMERICA,
State of Georgia:

To the Honorable William H. Fish, Chief Justice of the Supreme Court of Georgia:

The petition of Thomas M. Kener, Administrator of Edwin Kener, deceased, respectfully shows:

That on the 17th day of February, 1911, the Supreme Court of Georgia rendered final judgment against your petitioner in a certain cause wherein your petitioner was plaintiff in error and La Grange Mills defendant in error, affirming the judgment of the Superior Court of Troup County, Georgia, against your petitioner and in favor of said La Grange Mills, in a suit filed by petitioner against said La Grange Mills for the recovery of a one-fifth undivided interest in certain lands in said County, and for costs, as will fully appear by reference to the record and proceedings in said case, and that the said Supreme Court of Georgia is the highest court of said State in which a decision in said suit could be had.

And your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error under Section 709 of the Revised Statutes of the United States, because it was contended by your petitioner before the said Supreme Court of Georgia that the homestead exemption set apart in 1878 to Godfred Kener, bankrupt, was not subject to a judgment founded on a debt
contracted prior to the adoption of the Constitution of the
7½ State of Georgia of 1868; that a sale of said homestead under an execution predicated on such judgment was void; that the title to the property thus sold remained in said Godfred Kener until his death, when it descended by operation of law to his children, including plaintiff's intestate; that under the agreed statement of facts, in which it appears that the defendant claims the premises under said void sale, the petitioner was entitled to recover the interest in the land sued for.

Upon the hearing of said case, the said Supreme Court of Georgia held that "an exemption in bankruptcy made under the Constitution of 1868 is subject to a judgment founded on a debt contracted prior to the adoption of said Constitution," and affirmed the judgment of the court below in favor of the defendant therein and against your petitioner, as appears by the record of the proceedings in said cause, which is herewith submitted.

Wherefore, your petitioner prays the allowance of a writ of error, returnable to the Supreme Court of the United States, and for citation and supersedeas; and your petitioner will ever pray, etc.

THOMAS M. KENER,
Adm'r of Edwin Kener, Petitioner.

DAN'L W. ROUNTREE,
Attorney for Petitioner.

Let the writ of error issue as prayed.
April 4, 1911.

WM. H. FISH,
Chief Justice of the Supreme Court
of the State of Georgia.

(Endorsed:) Filed in Office April 6, 1911. Z. D. Harrison, C. S. C. Ga.

8 The Supreme Court of the State of Georgia.

THOMAS M. KENER, Administrator of Edwin Kener, Deceased,
Plaintiff in Error,
vs.
LA GRANGE MILLS, Defendant in Error.

Now comes the said plaintiff in error and respectfully submits:

That in the record, proceedings, decision and final judgment of the Supreme Court of Georgia in the above entitled matter, there is manifest error in this, to wit:

1.

The court erred in not reversing the judgment of the court below and in not directing a judgment for plaintiff in error, under the agreed statement of facts, for the premises in dispute.

2.

The court erred in holding that the homestead exemption set apart in 1878 to Godfred Kener, bankrupt, was "subject to a judgment founded on a debt contracted prior to the adoption" of the Constitution of the State of Georgia of 1868.

3.

The court erred in not holding that said homestead exemption was valid against said debt.

9

4.

The court erred in holding that the sale of said homestead exemption in bankruptcy under an execution upon a judgment founded on a debt contracted prior to the adoption of the Constitution of 1868, was a valid sale, which conveyed the title from said bankrupt to the purchaser at such sale and her assigns.

5.

The court erred in not holding that said sale of said homestead exemption in bankruptcy was invalid and conveyed no title thereto to the purchaser at such sale, or her assigns.

6.

The court erred in holding that the Act of Congress of March 3rd, 1873, which is substantially set forth in Section 5045 of the Revised Statutes and which provided that a homestead exemption in bankruptcy was valid "against debts contracted before the adoption and passage of said State Constitution and laws, as well as those contracted after the same, and against liens by judgment or decree of any State court; any decision of such court rendered since the adoption and passage of such Constitution and laws to the contrary notwithstanding," is void and of no effect.

10

7.

The court erred in not holding that said Act of Congress was valid, and that under the provisions thereof the homestead exemption to Godfred Kener, bankrupt, was valid against the debt under which it was sold, and that the sale was invalid and passed no title to the purchaser or her assigns.

DAN'L W. ROUNTREE,
Attorney for Plaintiff in Error.

(Endorsed:) Filed in Office April 6, 1911. Z. D. Harrison, C. S. C. Ga.

11 In the Supreme Court of the State of Georgia.

THOMAS M. KENER, Administrator of Edwin Kener, Deceased, Plaintiff in Error,
v.
LA GRANGE MILLS, Defendant in Error.

Know all men by these presents, That Thomas M. Kener, Administrator of Edwin Kener, Deceased, as Principal, and C. W. Russell, as Surety, are held and firmly bound unto La Grange Mills, the Defendant in Error in the above stated case, and its successors and assigns, in the sum of Two Hundred and Fifty ($250.00) Dollars, conditioned as follows, to wit:

Whereas, the above named Thomas M. Kener, Administrator of Edwin Kener, deceased, has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Georgia;

Now, if the said Plaintiff in Error shall prosecute his said writ of error to effect, and answer all costs and damages if he shall fail to make good his plea, this obligation shall be void, otherwise to remain of full force and effect.

This 4th day of April, 1911.

THOMAS M. KENER. [L. S.]
Adm'r of Edwin Kener, Deceased.
C. W. RUSSELL, *Surety.* [L. S.]

Approved April 4, 1911.
WM. H. FISH,
Chief Justice Supreme Court of Georgia.

(Endorsed:) Filed in Office April 6, 1911. Z. D. Harrison, C. S. C. Ga.

12 THOMAS M. KENER, Adm'r of Edwin Kener, Deceased, Plaintiff in Error,
vs.
LA GRANGE MILLS, Defendant in Error.

In Error to the Supreme Court of Georgia to the S. C. of Troup.

Be it remembered:

That the case of Thomas M. Kener, administrator of the estate of Edwin Kener, deceased, against the La Grange Mills, came on to be heard at the Fall Term, 1909, of Troup Superior Court, his Honor R. W. Freeman, Judge of said court then and there presiding. By agreement of counsel said case was heard by said judge, both as to the law and facts, without the intervention of a jury. Said case was heard on an agreed state of facts, which was in writing, and was filed as a part of the record in said case. After hearing said case and the argument of counsel the said judge, on the first day of December, 1909, rendered a judgment in favor of the defendant, to which judgment plaintiff then and there excepted, and here and now excepts, and assigns the same as error, and for ground of error among others say:

1. Said judgment is contrary to law.
2. Said judgment is contrary to the evidence in said case, and without evidence to support it.
3. It appearing from the evidence that Godfred Kener, the ancestor of Edwin Kener, deceased, went into bankruptcy and was declared an involuntary bankrupt, that the property sued for
13 was set aside to him as a homestead by the bankrupt court, under the acts of Congress and the constitution of the State of Georgia of 1868, that all of this was done in 1878 and 1879, that Godfred Kener died in possession of the property sued for in 1879, that Edwin Kener was insane at the time of said Godfred Kener's death, and so remained ever since to the date of his death; that minor children of Godfred Kener were living on said property at the time of the sale of said property by the sheriff, said sale was void and did not divest the title of said Edwin Kener; that plaintiff in error contends that the court erred in finding to the contrary, both on the law and the facts.

Plaintiff in error specifies as material to a clear understanding of the errors alleged to have been committed, the following parts of the record in said case:

1. The petition.
2. All amendments to the petition.
3. All pleas of defendant and amendments thereto.

The agreed state of facts.
The agreement for the court to hear the case without a jury.
The judgment of the court.

And now comes the plaintiff in error within the time allowed by law and presents this bill of exceptions, and prays that the same may be signed and certified, in order that the errors alleged to have been committed, may be considered and corrected.

W. H. TERRELL,
Attorney for Plaintiff in Error.

Temple Court, Atlanta, Ga.

14 I do certify that the foregoing bill of exceptions is true, and specifies all of the evidence and specifies all of the record material to a clear understanding of the errors complained of, and the clerk of the superior court of Troup County is hereby ordered to make out a complete copy of all of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such, and cause the same to be transmitted to the next March Term of the Supreme Court, that the errors alleged to have been committed may be considered and corrected.

The words in this certificate "and contain" stricken before signing.

This December 29, 1909.

R. W. FREEMAN, *J. S. C. C. C.*

Clerk's Certificate.

CLERK'S OFFICE, SUPERIOR
COURT OF TROUP COUNTY.

LA GRANGE, GA., *Jan'y 13th*, 1910.

I hereby certify that the foregoing is the true original bill of exceptions, filed in this office, in the case therein stated; and that a copy thereof has been made and is now on file in this office.

Witness my signature and the seal of said court hereto affixed, the day and year last above written.

[SEAL.] W. L. CLEAVELAND, *Clerk.*

I acknowledge due and legal service of this bill of exceptions, Jan'y 4, 1910.

F. M. LONGLEY,
Att'y for La Grange Mills, La Grange, Ga.

15 (Endorsed:) Thos. M. Kener, Adm'r Edwin Kener, Deceased, Pl'ff in Error vs. La Grange Mills, Defendant in Error. Original Bill of Exceptions. Georgia, Troup County. Filed in Office Jan'y 4, 1910. W. L. Cleaveland, *C. S. C.*

(Endorsed:) No. 3 Coweta Circuit. March Term, 1910, Supreme Court. Kener, Administrator, vs. La Grange Mills. Bill of Exceptions. Filed in Office Jan'y 11, 1910. W. E. Talley, *D. C. S. C.* Ga.

16 GEORGIA,
Troup County:

To the Superior Court of said County:

The petition of Thomas M. Keener, as administrator of the estate of Edwin Keener, deceased, showeth:

1st.

That the La Grange Mills, a corporation of said county is in possession of a certain tract of land in said county, described as follows: "All that tract or parcel of land in the city of La Grange, said county and State, containing about three acres more or less, and bounded as follows: Beginning at the corner of Hines and Morgan sts. and running east along the side of Hines street five hundred and thirty seven (537) feet, thence south one hundred and fifty (150) feet to right of way of Atlanta & West Point Railroad; thence in a southwesterly direction along said right of way of said railroad three hundred and sixty (360) feet; thence in a westerly direction one hundred and seventy-eight (178) feet; thence in a northerly direction forty-seven (47) feet; thence west one hundred and eighty-six (186) to Moragan street; thence north along the east side of Moragan street three hundred and thirty-eight (338) feet to the beginning point."

2.

Petitioner claims title to a one-fifth undivided interest in said land, being seized thereof in fee.

17

3.

The said defendant has received the profits from said land since the — day of September, 1879, of the yearly value of $2,400.

4.

Defendant refuses to deliver said land to your petitioner, or to pay him the profits thereof.

Wherefore, Petitioner prays that process may issue requiring the said defendant to be and appear at the next term of this Court to answer this complaint.

W. H. TERRELL,
Petitioner's Att'y.

Abstract of Title.

Godfred Keener was in possession of said land on the — day of June, 1879.

Godfred Keener died on the — day of June, 1879, leaving five children as his heirs at law. Edwin Keener is a son of Godfred Keener.

On the date of the death of Godfred Keener, Edward Keener was insane, and remained insane until the day of his death.

Edwin Keener died on the 4th day of November, 1903.

Thomas M. Keener is the administrator of the estate of Edwin Keener, deceased. George L. Perry, the administrator of the estate of Godfred Keener, is non compos mentis, so that his consent to the bringing of this action can not be obtained.

18 STATE OF GEORGIA,
Troup County:

THOMAS M. KENER, Adm'r Estate of Edwin Kener, Deceased,
vs.
LA GRANGE MILLS.

To the Sheriff of said County or his legal deputies:

La Grange Mills,

"The defendant, La Grange Mills, is hereby required personally or by an attorney, to be and appear at the next superior court to be holden in and for said county, on the first Monday in May next, then and there to answer the plaintiff's complaint, as in default thereof the court will proceed as to justice shall appertain.

Witness the Honorable R. W. Freeman, Judge of said court, this the 14th day of December, 1907.

W. L. CLEAVELAND, *Clerk.*

Filed in office Demember 14, 1907. W. L. Cleveland, Clerk.

Sheriff's Return.

I have this day served the defendant, La Grange Mills, by serving J. M. Barnard personally with a copy of the within writ, this the 24th day of December, 1907.

O. H. FLORENCE,
Sheriff Troup County, Ga.

19 May Term, Troup Superior Court, 1908.

THOMAS M. KEENER, Adm'r Estate Edwin Keener, Dec'd,
vs.
THE LA GRANGE MILLS.

Demurrer.

And now comes the defendant, and reserving all rights to plead to the merits of this action, demurs generally to the same, and says the plaintiff has set forth no cause of action in this petition, and of this it prays judgment of the court. And this defendant demurs specially to said petition on following grounds:

1st. Because plaintiff does not set forth the names of the heirs at law and the interest of each of Godfred Keener, at the date of his death, so as to show whether plaintiff, as administrator, would be entitled to a one-fifth interest in the estate of intestate Keener; defendant insisting that it has the right to know the names and interests of the heirs at law in the estate of Godfred Keener at the time of his death, so as to ascertain clearly the interest of plaintiff's intestate.

2nd. Because, as shown by said petition, George L. Peavy is the administrator on the estate of Godfred Keener, and that his consent to the bringing of this suit was not obtained before the filing of the same, that said Peavy, as such administrator, has not given his consent that plaintiff might bring this action, and if it be true that said Peavy is non compos mentis, as alleged, it was incumbent on
20 plaintiff to have caused his removal and to have had an administrator de bonis appointed, as the right to recover real estate by an heir at law from third persons is solely in the administrator, where one is appointed, and this right having vested solely in George L. Peavy, the administrator alone or his successor as administrator be bonis non, in whom this right is vested, must bring this suit, or consent for plaintiff to bring it, and of this defendant prays judgment of this court.

F. M. LONGLEY,
M. U. MOOTY,
Def'ts Att'ys.

Filed in office May 6th, 1908. W. L. Cleaveland, C. S. C.

Troup Superior Court, May Term, 1908.

THOMAS M. KENER, Adm'r, etc.,
vs.
THE LA GRANGE MILLS.

And now comes the defendant in the above-stated case, and at this term of the court, and answering the same says:

1st.

Defendant admits paragraph one of the plaintiff's petition.

2nd.

Defendant denies paragraph two, in so far as any claim of right or title exists in plaintiff's intestate to or any interest in the
21 premises in dispute *in dispute*.

3.

Defendant denies paragraph three of the plaintiff's petition.

4.

Defendant admits paragraph four of the petition. Defendant denies that on the death of Godfred Kener, Edwin Kener was insane

and remained insane until the day of his death. Defendant denies that George L. Peavy, the administrator of the estate of Godfred Kener is non compos mentis.

Answering further said petition this defendant says: 1st. That Godfred Keener died in June 1879, and that Geore L. Peavy was appointed his administrator on September 1879, and has never been discharged from his trust, that at the date of the death of Godfred Kener he owned a large amount of money in judgments, far more than his property was worth, and among his creditors was a judgment and execution in favor of A. & T. S. Tharp, issued from the Superior court of Troup County, and which was duly levied by the sheriff, W. G. S. Martin of Troup County, on all of the real estate set forth in plaintiff's petition, and which after due advertisement by said sheriff in the La Grange Reporter Newspaper, in which the legal advertisements of the county of Troup were published, said sheriff put up for sale to the highest bidder, for cash, on the first Tuesday in December 1879, before the court-house door in the city of La Grange,
22 Ga., said property, when the same was knocked off by said sheriff to Eugenia Peavy, for the sum of $1,500, she being the highest bidder. That George L. Peavy as such administrator was in possession of said property at the date of the sale, and was present at said sale, and received the purchase-money of said sale, less the amount of said fi. fa., that said sheriff made a deed and delivered the same to said property, to the purchaser, Eugenia Peavy.

That afterwards, to wit, said Eugenia for the consideration of $2,500.00 conveyed the same property on Sept. 1st, 1881, to Thomas C. Crenshaw, who in turn sold and conveyed the same to Mary L. Wright, who erected a large brick warehouse on the same at a cost of $5,000.00, and afterwards she sold and conveyed the same for value to Jas. G. Truitt, and in May 1886 said Truitt sold and conveyed said property to defendant, with improvements placed thereon for the sum of $——. That each purchaser went into possession of said purchase bona fide, and held the same without the slightest notice of any adverse claimant. This defendant bought this property in May 1886, it was then worth $——, because of a brick warehouse put up by Mrs. Mary L. Wright, and the sum of $3,000.00 had been expended on the old variety shop by T. C. Crenshaw. Defendant copurchased this property bona fide, relying on the validity of said sheriff's sale as passing the title to the purchaser, and in pursuance of said purchase, with assurance of the perfect title
23 of defendant, it proceeded to erect thereon its main cotton mill building, with its machinery, engines and boilers, at a cost to it of $——, also a new brick machine shop building with its equipment, at a cost of $——, also its main warehouse at a cost of $——, also its cotton seed oil and ginnery buildings at a cost of $——, also the brick warehouse erected by Mary L. Wright, at a cost of $5,000.00. That the market value of all of said property just as it stood at the death of Godfred Keener was only about $1,500.00, that the value of said real estate just as it existed at the death of Godfred Keener, without the improvements put on the same by defendant and its predecessors in title, is at the present time not worth

more than $3,000.00. That heretofore at the — term of the Superior Court, 1902, Thos. M. Keener, as next friend of Mary J. Ke-er. brought suit for her dower in said premises, and recovered the rental value of said premises from May 1886 to May 1907, as appears of record in this court, a copy of which is hereto attached, marked Exhibit B." That if plaintiff had a right to recover at all the mesne profits after deducting his part of the taxes, insurance, repairs, etc., he would not be entitled to more than $300.00, or some such sum. This defendant prays that the view of the fact that it bona fide put these improvements on said premises, if it should be found on the trial of said case, that a fifth interest in the land and tene-
24 ments, as the same existed at the death of Godfred Keener, is in plaintiff's intestate. That said improvements be allowed as a set-off against said plaintiff, and such decree be rendered as is equitable and in accordance with the statute of this State in such cases made and provided.

F. M. LONGLEY,
M. U. MOOTY,
Defendant's Attorneys.

Filed in office May 5, 1908. W. L. Cleveland, C. S. C.

November, 1908.

THOMAS M. KEENER, Adm'r, etc.,
vs.
LA GRANGE MILLS.

And now at this term of the court comes the defendant, and in answer to the amended petition of plaintiff says:

1st. Defendant denies paragraph one of said amended petition and avers that in addition to the children of Godfred Keener, as named in said petition, there was at the death of said Godfred Keener, another child of his viz. Otto Kener.

2nd. Defendant denies *denies* paragraph two of said amendment to the effect that before the filing of said petition, or since then, the consent of George L. Peavy was obtained by the plaintiff, that he, the plaintiff, might bring said suit, the same is untrue, of this
25 defendant puts itself on the country.

F. M. LONGLEY,
M. U. MOOTY.

Filed in office November 16, 1908. W. L. Cleaveland, C. S. C.

THOMAS M. KENER, Adm'r Estate Edwin Kener,
v.
THE LA GRANGE MILLS.

By agreement the statement of facts in this case amended as follows:

1st. The suit, the foundation of the judgment of A. & T. S. Tharp

v. Godfred Kener brought to the November Term of Troup Superior Court 1857, on which judgment was rendered at May Term 1858, for $380.88, was based on a contract, as shown by the copy of the suit hereto attached, marked "Exhibit A." This judgment was afterwards revived by sci fa as shown in the agreed statement of facts, on which a fi. fa. issued on the revived judgment, and which was the execution under which the property in controversy was sold by sheriff.

2nd. Plaintiff claims title under the bankrupt act and all amendments thereto, including the act of Congress of March 3rd, 1873.

3rd. Defendant claims the sheriff's sale was legal under the
26 law of Georgia, passing the title to the purchaser under whom it claims the sale could not be void, if in accordance with the law of this State, as decided by our Supreme Court in the following cases:

76 Ga. 1;
55 Ga. 579;
60 Ga. 375;
50 Ga. 81, 625;
51 Ga. 460 &
53 Ga. 485.

The sale being legal, lunacy or minority could not affect its legality.

11th Ga. 424 (8).

W. H. TERRELL,
Pl'ff's Attorney.
F. M. LONGLEY,
Def't's Attorney.

STATE OF GEORGIA,
Troup County:

To the Honorable the Superior Court of said County:

The petition of Andrew Tharp and Thomas S. Tharp, parties under the name and style of A. & T. S. Tharp, respectfully showeth: That Godfred Kener of said county is justly indebted to your petitioners in the sum of $374.14, with exchange, beside interest and current exchange from La Grange to New York. For that whereas said plaintiff heretofore, to wit, on the 20th day of March, in the year of our Lord one thousand eight hundred and fifty seven, at New York, to wit: in the county aforesaid drew there a certain instrument in writing, commonly called a draft or bill of exchange, their
27 own proper handwriting being thereunto subscribed, the date whereof is thedate and year aforesaid, which is now shown to the court whereof, whereby he promised, in substance, as follows: to wit, New York May 20, 1857, four months after date pay to the order of ourselves three hundred and seventy-four and fourteen 14 100 dollars, with current *exchange*, value received, and charge the same to account of A. and T. S. Tharp. To G. Keener, La Grange, Ga.

And afterwards, to wit on the day and year aforesaid, the said Godfred Keener accepted the said bill of exchange by writing across the face thereof thus: "Accepted, payable at the Agency Bank of Commerce of La Grange. Godfred Keener.

By means whereof and by force of the statute in said cases made and provided, the said defendant became liable to pay your petitioner the sum of money in said bill of exchange specified, according to the tenor and effect thereof, and being so liable he, the said defendant, in consideration thereof afterwards, to wit, on the day and year aforesaid undertook, and then and there faithfully promised your petitioner to pay them the said sum of money in said bill of exchange, as specified according to the tenor and effect thereof; whenever the said defendant should be thereunto afterwards requested. Yet *on* said defendant although so liable and indebted, and notwithstanding his said undertaking and promise has not paid the said sum of money in said bill of exchange specified, or any part thereof,
28 although thereunto often requested but the same to pay has hereunto refused, and still refuses, to the damage of your petitioner —— dollars.

Wherefore your petitioner brings suit and prays process may issue, requiring the said defendant to be and appear personally or by an attorney, to be and appear at the next superior court, to be held in and for said county, then and there to answer petitioners in an action of assumpsit.

B'NJ. H. BIGHAM,
Plaintiffs' Attorney.

Filed in office Oct. 27, 1858. Wm. Latimer, Clerk. A. & T. S. Tharp vs. Godfred Keener assumpsit.

Then follows the process of the court in regular and usual form, Troup Superior Court, May Term, 1858.

I confess judgment for the plaintiff the sum of $380.88, with interest and cost of suit.
(Signed)
GODFRED KEENER.

Following the confession of judgment was entered on May 28, 1858, judgment for plaintiffs for $380.88 against the defendant, Godfred Keener, in regular form, signed by Benj. H. Bigham, Plaintiff's Attorney.

29 I, W. L. Cleaveland, Clerk of the superior court in and for the county of Troup, do certify that the foregoing is a true transcript from the records of said court in the case of A. and T. S. Tharp vs. Godfred Keener, as found in record book of said court R, on pages 554 and 555, the same being recorded book of petitions, or suits, and is the basis of the rule to revive said judgment as found on minute book of this court 9 pages 365, 6.

Given under my hand and seal of office, November 20, 1909.

[SEAL.] W. L. CLEAVELAND,
Clerk Superior Court, Troup County, Georgia.

We agree that the foregoing petition was and is the foundation of the revived judgment of A. and T. S. Tharp vs. Godfred Keener, from which the execution issued that sold the Keener property on the first Tuesday in December, 1879.

11/22/09.

W. H. TERRELL,
Att'y for T. M. Keener, Adm'r.
F. M. LONGLEY,
Att'y for La Grange Mills.

30 No. —. Troup, S. C.

KEENER, Adm'r,
vs.
LA GRANGE MILLS.

We agree in this case that the following is true:

Thomas M. Keener and Annie Keener, children of Godfred Keener, were minors at the time of the sale by the sheriff of the property described in the petition.

That the value of the building put on said property by La Grange Mills and its predecessors in title is $90,000.00.

That the value of the land is $12,500.00.

That the value of the machinery is $186,755.00.

The rental value of the property exclusive of buildings aforesaid is $200.00 per annum. Plaintiff had the consent of George L. Peavy, adm'r of Godfred Keener, deceased, to bring this suit.

There is to be no deducting for taxes, insurance or repairs. In his return as administrator of Godfred Keener, George L. Peavy used the following language: "All the real estate of deceased and the machinery connected therewith was sold by the sheriff on the first Tuesday in December, 1879, under an execution against said deceased and the proceeds thereof applied to the payment of said execution and other fi. fas. against deceased.

None of the proceeds of said sale came into my hands. The machinery mentioned is cotton mill machinery attached to the
31 building in the manner such machinery is usually attached in a going cotton mill used for the manufacture of cotton duck and cotton yarn.

November 2nd, 1909.

W. H. TERRELL, *Pl'ffs' Att'y.*
F. M. LONGLEY, *Def't's Att'y.*

Agreed Statement of Fact in Case of Thos. M. Keener, Adm'r of Edwin Keener, vs. La Grange Mills.

In this case it is agreed first: That Edwin Keener was a son of G. Keener, and was adjudged insane in 1876, and sent to the State Asylum, and there remained insane until his death on 4th day of November, 1903, and that Thos. M. Kener is his administrator.

2nd. That G. Kener was in possession, as owner of the property in dispute at the time of his death in June, 1879, that said G. Keener died intestate and Geo. Peavy became his administrator 1st Monday September thereafter, that G. Kener left five children, of whom Edwin was one, and was of the age of 21 years when his father died.

3rd. That in June 8th day 1858 A. & T. S. Tharp obtained judgment against G. Kener in Troup superior court for $380.88 principal, $21.80 interest to that date, that a ruling nisi to revive the judgment was issued 31st of December 1889 (1869?) and served on G.
32 Kener April 20, 1870, and said judgment was revived at the May term, 1873 of said court, and fi. fa. issued thereon August 1873.

4th. That G. Kener was adjudged a bankrupt on his own petition in 1878 and returned in his schedule of creditors the Tharps execution, that said Keener was discharged on the — day of 1878, that T. C. Crenshaw was the assignee of said Keener, and set aside as his bankrupt homestead the property now in suit. November 8th, that the Tharps never proved their claim in the bankrupt court, nor did they receive any payment on their fi. fa.

5th. That after the death of G. Keener the sheriff of Troup county sold at sheriff's sale, under the Tharp fi. fa., the whole property that had been set apart as a bankrupt homestead to said Kener on the first Tuesday in December, 1879, after having first levied on the same, and after advertising the same according to law, before the court-house door in La Grange, Ga., to the highest bidder for cash, and that Eugenia Peavy, one of G. Keener's children, bought said property for $1,500.00, that she was the wife of George Peavy, the administrator of G. Kener, who was present at said sale, and gave no notice or made any objections to said sale, that the sheriff executed a and delivered to said Mrs. Peavy a deed of conveyance to said property, as the highest bidder, and who took immediate possession of the same.

6th. That afterwards said Mrs. Peavy sold and conveyed this property to T. C. Crenshaw on the first of September, 1881,
33 for $2,500.00. That said Crenshaw on the 3rd day of May, 1882, sold the same to Mrs. M. E. Wright for $2,750.00, by deed. That afterwards, on March 8, 1888, Mrs. Wright sold and conveyed the property to J. G. Truitt for $8,200.00, and on May 23, 1888, Truitt in turn sold and conveyed the same to the La Grange Mills, defendant. That after Crenshaw bought said property he put valuable improvements on the property, and Mrs. Wright also did the same, erecting a brick warehouse on the same of the value of about $5,000.00. That possession followed each of the purchases, * * * that the La Grange Mills erected a large cotton mill, cotton seed oil mill, machine shop, warehouse, etc., at a cost and of the value of between $350,000.00 and $400,000.00. That about the year 1869 Mrs. Kener, wife of G. Kener was carried to the State Asylum, where she remained until her death in 1905, that some time after 1900 she took and had assigned to her dower in the rents of said property, which was paid to her until her death. This agreement does not preclude either party from the introduction of other evidence, or

controverting the legality of any of the acts, nor of precluding the defendant from setting up any additional defense it may have, either equitable or legal, to this suit.

F. M. LONGLEY,
Deft's Attorney.

I agree *that* all this except as to the value of improvements made by La Grange Mills and Mrs. Wright and others. This October 16, 1909.

W. H. TERRELL,
Att'y for Pl'ff.

34 I want you to also agree that the family of G. Kener, except his wife and Edwin Kener, were both in the asylum at Milledgeville, and insane at his death, were living on the homestead property at his, G. Keener's death, and continued to live there to, and were living there at the time of the sale.
This Oct. 16, '09.

W. H. TERRELL,
Pl'ff's Att'y.

Filed in office Nov. 2, 1909. W. L. Cleaveland, C. S. C.

Troup Superior Court. August Adjourned Term, 1909.

THOMAS M. KEENER, Adm'r Edwin Keener,
vs.
LA GRANGE MILLS.

Complaint for Land.

Troup Superior Court.

The above-stated case coming on to be heard at the August adjourned term of said court, 1909, and the parties having agreed upon the facts, submitted the case to the judge to be decided by him without the intervention of a jury. Upon a consideration of the case I find for the defendant, with cost of suit. It is ordered, considered and adjudged that the plaintiff recover nothing by this suit, and it is further considered and adjudged that the defendant recover of the plaintiff the sum of — Dollars costs.
This November 30, 1909.

R. W. FREEMAN,
J. S. C. C. C.

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CLERK'S OFFICE,
SUPERIOR COURT OF TROUP COUNTY, GA.,
LA GRANGE, GA., *Jan'y* 13, 1910.

I hereby certify that the foregoing pages hereto attached contain a true transcript of such parts of the record as are specified in the bill of exceptions and required by the order of the Presiding Judge, to

be sent to the Supreme Court in the case of Thos. M. Kener, Adm'r of Edwin Kener, deceased, plaintiff in error, vs. La Grange Mills, defendant in error. All of which appears from the records and minutes of said court.

Witness my signature and the seal of said court, affixed the day and year first above written.

[SEAL.] W. L. CLEAVELAND,
Clerk Superior Court Troup Co., Ga.

36 (Endorsed:) No. 3 Coweta Circuit. Supreme Court of Georgia. March Term, 1910. Thos. M. Kener, Adm'r Edwin Kener, deceased, Pl'ff in Error, vs. La Grange Mills, Defendant in Error. Transcript of Record. Filed in Office, this 14 day of Jan'y 1910. W. E. Talley, D. Clerk Supreme Court. W. H. Terrell, Att'y Plaintiff in Error.

37 191.

3 Coweta, March T., 1910.

KENER, Administrator,
v.
LA GRANGE MILLS.

By the COURT, per FISH, *C. J.*:

An exemption in bankruptcy, made under the constitution of 1868, is subject to a judgment founded on a debt contracted prior to the adoption of such constitution. The proceedings in bankruptcy do not affect the creditor, he not having proved his debt nor otherwise submitted his claim to the bankrupt court. Hiley v. Bridges, 60 Ga. 375; Shipp v. Smith, 76 Ga. 1; Dozier v. McWhorter, 113 Ga. 584.

(*a*) Applying the rule above announced to the facts as agreed upon in the present case, the court did not err in rendering the judgment of which complaint is made.

Judgment affirmed. All the Justices concur.

38 Supreme Court of the State of Georgia.

ATLANTA, *February* 17, 1911.

The Honorable Supreme Court met pursuant to adjournment.
Present all of the Justices.
The following judgment was rendered:

T. M. KENER, Adm'r,
v.
LA GRANGE MILLS.

This case came before this court upon a writ of error from the Superior Court of Troup County; and after argument had, it is ordered and adjudged that the judgment of the court below be affirmed.
All the Justices concur.
Bill of costs $10.00.

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CLERK'S OFFICE,
SUPREME COURT OF THE STATE OF GEORGIA,
ATLANTA, GA., *May* 1, 1911.

I hereby certify that the foregoing pages hereto attached contain the original writ of error to the Supreme Court of the United States, and original citation and copies of the petition for said writ of error, assignments of error and bond for costs in the case of Thomas M. Kener, administrator of Edwin Kener, deceased, v. La Grange Mills, also full, true and complete copies of the bills of exceptions, transcript of record, opinion and judgment of the Supreme Court of the State of Georgia in said case, as appears from the records and files of this office.

Witness my signature and the seal of the Supreme Court of Georgia hereto affixed the day and year above written.

[Seal Supreme Court of the State of Georgia, 1845.]

Z. D. HARRISON,
Clerk Supreme Court of Georgia.

Endorsed on cover: File No. 22,812. Georgia Supreme Court. Term No. 63. Thomas M. Kener, Administrator of Edwin Kener, deceased, plaintiff in error, vs. La Grange Mills. Filed July 21st, 1911. File No. 22,812.

6

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 63.

THOMAS M. KEENER, ADMINISTRATOR OF EDWIN KEENER, DECEASED, PLAINTIFF IN ERROR,

vs.

LA GRANGE MILLS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF FOR PLAINTIFF IN ERROR

W. H. TERRELL,
CLIFFORD L. ANDERSON,
DANIEL W. ROUNTREE,
Attorneys for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 63.

THOMAS M. KEENER, ADMINISTRATOR OF EDWIN KEENER, DECEASED, PLAINTIFF IN ERROR,

vs.

LA GRANGE MILLS

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA

STATEMENT OF FACTS.

"Thomas M. Keener, as Administrator of the Estate of Edwin Keener, deceased," filed a complaint for land, a statutory action of ejectment, in the Superior Court of Troup County, Georgia, against the LaGrange Mills for the recovery of an undivided one-fifth interest in a certain tract of land located in said County and fully described in his petition.

The case was tried before the Court without a jury, upon agreed statements of fact, one of which will be found on pages 16 to 18, inclusive, of the printed record, one on pages 13 and 14, and another on page 16.

The agreed facts, here material, are as follows, to wit:

Plaintiff and Defendant claimed title under Godfred Keener, a common propositus.

"Edwin Keener (Plaintiff's intestate) was a son of G. Keener. * * * Thomas M. Keener is his administrator." (Printed record, page 16.)

"G. Keener was in possession, as owner, of the property in dispute at the time of his death in June, 1879. * * said G. Keener died intestate * * left five children." (Record, page 17.)

"In June 8th day, 1858, A. & T. S. Tharp obtained judgment against G. Keener in Troup Superior Court," which was revived in 1873 "and fi. fa. issued thereon August 1873." (Record, page 17.)

The debt thus reduced to execution was contracted "on the 20th day of March, in the year of our Lord one thousand eight hundred and fifty-seven." (Record, page 14.)

"G. Keener was adjudged a bankrupt on his own petition in 1878 and returned in his schedule of creditors the Tharp's execution. * * said Keener was discharged on the ——— day of ———————, 1878. * * T. C. Crenshaw was the assignee of said Keener and set aside as his bankrupt homestead the property now in suit. * * The Tharps never proved their claim in the bankrupt court, nor did they receive any payment on their fi. fa." (Record, page 17.)

"After the death of G. Keener, the sheriff of Troup County sold to the predecessor in title of the LaGrange Mills, at sheriff's sale under the Tharp fi. fa., the whole property that had been set apart as a bankrupt homestead to said Keener, on the first Tuesday in December, 1879, after having first levied on the same and after advertising the same according to law, before the court house door in LaGrange, Georgia." G. Keener's Administrator, "was present at said sale and gave no notice or made any objection to said sale." The sheriff executed and delivered a deed of conveyance to the purchaser, "who took immediate possession of the same." (Record, page 17.)

"Thomas M. Keener and Annie Keener, children of Godfred Keener, were minors at the time of the sale by the sheriff of the property described in the petition." (Record, page 16.)

"Plaintiff claims title under the bankrupt act and all amendments thereto, including the Act of Congress of March 3rd, 1873." (Record, page 14.)

"Defendant claims the sheriff's sale was legal under the laws of Georgia, passing the title to the purchaser, under whom it claims." (Record, page 14.)

There was a judgment for the Defendant and upon a writ of error the Supreme Court, the highest Court of the State, affirmed this judgment solely on the ground that Godfred Keener's title was divested by the sheriff's sale. All other defenses made by the pleadings were palpably without merit and were ignored by the Court. The decision will be found in 135 Ga., 730, and is as follows:

"Keener, Administrator, v. LaGrange Mills.

"Fish, C. J. An exemption in bankruptcy made under the Constitution of 1868, is subject to a judgment founded on a debt contracted prior to the adoption of such constitution. The proceedings in bankruptcy do not affect the creditor, he not having proved his debt nor otherwise submitted his claim to the bankrupt court. Hiley vs. Bridges, 60 Ga. 375; Shipp vs. Smith, 76 Ga. 1; Dozier vs. McWhorter, 113 Ga. 584 (39 S. E. 106).

"(a) Applying the ruling above announced to the facts as agreed upon in the present case, the court did not err in rendering the judgment of which complaint is made."

This judgment of the Supreme Court is the one now under review. It was contended by Plaintiff in Error, both in his bill of exceptions in the State Court (Record, p. 7) and in his assignments of error here, (Record, pp. 5, 6) that the sale was void and that by holding it valid he was denied a right under the laws of the United States.

SPECIFICATION OF ERRORS.

1.

The Court erred in not reversing the judgment of the Court below and in not directing a judgment for Plaintiff in Error, under the agreed statements of facts, for the premises in dispute.

2.

The Court erred in holding that the Homestead exemption set apart in 1878 to Godfred Keener, bankrupt, was "subject to a judgment founded on a debt contracted prior to the adoption" of the Constitution of the State of Georgia of 1868.

3.

The Court erred in not holding that said homestead exemption was valid against said debt.

4.

The Court erred in holding that the sale of said Homestead exemption in bankruptcy under an execution upon a judgment founded on a debt contracted prior to the adoption of the Constitution of 1868, was a valid sale, which conveyed the title from said bankrupt to the purchaser at such sale and her assigns.

5.

The Court erred in not holding that said sale of said homestead exemption in bankruptcy was invalid and conveyed no title thereto to the purchaser at such sale, or her assigns.

6.

The Court erred in holding that the Act of Congress of March 3rd, 1873, which is substantially set forth in Section 5045 of the Revised Statutes and which provided that a homestead exemption in bankruptcy was valid "against debts contracted before the adoption and passage of said State Constitution and laws, as well as those contracted after the same, and against liens by judgments or decree of any State Court; any decision of such Court rendered since the adoption and passage of such Constitution and laws to the contrary notwithstanding," is void and of no effect.

7.

The Court erred in not holding that said Act of Congress was valid, and that under the provisions thereof the homestead exemption to Godfred Keener, bankrupt, was valid against the debt under which it was sold, and that the sale was invalid and passed no title to the purchaser or her assigns.

ARGUMENT.

The "Bankrupt Homestead" was "set aside" by Keener's assignee in bankruptcy, and it is well settled, as ruled by the Supreme Court of Georgia in Ross vs. Worsham, 65 Ga. 622,

that "what has been done by the assignee is equivalent to compliance with the State's statutes in assigning homestead or claiming exemption."

It is also well settled that under the Constitution and laws of Georgia, a sale of a homestead exemption pending the homestead estate, that is to say: during the life of the widow or minority of the children, is void.

Dozier vs. McWhorter, 113 Ga. 581.
Evans vs. Piedmont Assn., 118 Ga. 882.
Williford vs. Denby, 127 Ga. 786.
Timothy vs. Chambers, 85 Ga. 267.
Hart vs. Evans, 80 Ga. 330.
Pinkerton vs. Tumlin, 22 Ga. 165.

Also that under the Act of 1868, a debt was released by a discharge whether scheduled or not. Heard vs. Arnold, 56 Ga. 576; Beck vs. Crumb, Ibid. 95.

The sole question, therefore, in this case is whether "an exemption in bankruptcy made under the Constitution of 1868, is subject to a judgment founded on a debt contracted prior to the adoption of such Constitution." The Bankruptcy Act of 1867 as amended in 1872 and again in 1873, provides, in terms, that it is not subject. In the instant case and in those cited in the opinion, the Supreme Court of Georgia holds that the act of Congress declaring "that such exemption (is) valid against debts contracted before the adoption and passage of said Constitution and laws, * * any decision of any (State) court rendered since the adoption and passage of said Constitution and Laws to the contrary, notwithstanding" is unconstitutional and void.

A like ruling was made in—

In re Deckert,
2 Hughes 183, 10 Nat. Bankr. Reg. 1, 7 Fed. Cas. No. 3728.

In re Duerson,
13 N. B. R. 183, 7 Fed. Cas. No. 4117.

In re Dillard,
9 N. B. R. 8, 7 Fed. Cas. No. 3912.

In re Shipman, 14 N. B. R. 570, 21 Fed. Cas. No. 12791.

This Act was held to be valid in—

In re Smith,
2 Woods 458, 14 N. B. R. 295, 22 Fed. Cas. No. 12996.

In re Jordan,
10 N. B. R. 427, 13 Fed. Cas. No. 7515.

In re Beckerford,
1 Dill. 45, 4 N. B. R. 203, 3 Fed. Cas. No. 1209.

In re Jordan,
8 N. B. R. 180.

In re Kean,
2 Hughes 322, 8 N. B. R. 367, 14 Fed. Cas. No. 7630.

In re Smith,
8 N. B. R. 401, 22 Fed. Cas. No. 12986.

Windley vs. Tankard, 88 N. C. 223.

Lamb vs. Chamness, 84 N. C. 379.

Simpson vs. Houston, 97 N. C. 344.

Darling vs. Berry, 13 Fed. 659.

The invalidity of the Act is urged on one of two theories, either that it impairs the obligation of contracts or destroys the requisite uniformity of the Bankrupt Act.

The fallacy of both theories is apparent.

The impairment clause is only a restriction upon the States. No provision of the Constitution prohibits Congress from passing laws impairing the obligation of contracts. On the contrary the power to enact Bankrupt Laws plainly authorizes it to annul or impair the obligations of contracts. Indeed this is the prime purpose of such laws. In addition to the cases above cited, see:—

Satterlee vs. Mathewson, 2 Pet. 380, 416.

Hepburn vs. Griswold, 8 Wall. 603.

Legal Tender Cases, 12 Wall. 457, 550, 110 U. S. 421, 449.

Mitchell vs. Clark, 110 U. S. 633.

Nor was the Act inconsistent with a uniform system of Bankruptcy. As "against debts contracted before the adoption" of the laws authorizing it, the exemption was valid and this was true in every State and therefore uniform.

In the leading Georgia case, Bush vs. Lester et al., 55 Ga. 579, 582, the learned Judge Bleckley argues that as against debts older than the State law, an exemption in Bankruptcy can not be valid and an exemption under the law invalid. As otherwise the rule of uniformity is violated.

Not so. The rule is applicable only to exemptions in Bankruptcy. It does not require that such exemptions and exemptions under the State law shall have the same characteristics.

and that neither or both shall be valid or invalid against specific debts.

The State laws fix and determine what property may be included in the exemption, and to that extent only were adopted.

We quote from the opinion in Bush vs. Lester:

"We hold with the Chief Justice of the United States (In re Daniel Deckert) 'that the amending Act of March 3, 1873 was unsuccessful in making unconstitutional provisions in State laws a part of a system of Bankruptcy.'"

Certainly not and Congress did not undertake to do so. Only the valid provisions in the State laws were made a part of the system, and the exemption "set aside" thereunder was valid against older debts not because of the unconstitutional provision in the State law but solely because of the Act, which Congress was competent to enact.

The Bankrupt Acts of 1867 and 1898 contain practically the same provisions as to exemptions and the uniformity of the latter is beyond question.

In addition to the cases cited, see on the question of uniformity:

Hanover Nat. Bank vs. Moyses, 186 U. S. 181.
Holden vs. Stratton, 198 U. S. 202, 214.
Thomas vs. Woods, 173 Fed. 585, 591.
In re Rouse Hozard & Co., 91 Fed. 96, 99.

Respectfully submitted,

W. H. Terrell,
Clifford L. Anderson,
Daniel W. Rountree,
Attorneys for Plaintiff in Error.

Supreme Court of the United States,

OCTOBER TERM, 1913.

No. 63.

THOMAS M. KEENER, Administrator of Edwin Keener, deceased,

Plaintiff in Error,

against

LA GRANGE MILLS.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

ARGUMENT FOR DEFENDANT IN ERROR.

LOUIS MARSHALL,
Counsel.

B. H. TYRREL, PRINTER, 206-8 FULTON STREET, NEW YORK.

Subject Index.

CASES AND AUTHORITIES CITED.

Decisions:

Supreme Court of the United States.

OCTOBER TERM 1913.

No. 63.

THOMAS M. KEENER, Administrator of Edwin Keener, deceased,
Plaintiff in Error,

against

LA GRANGE MILLS,
Defendant in Error.

Error to the Supreme Court of the State of Georgia.

Argument for Defendant in Error.

PLEADINGS.

This is an action of ejectment, brought by the plaintiff in error in the Superior Court of Troup County, Georgia, in December, 1907, to recover a one-fifth undivided interest in a parcel of land located in the City of La Grange, Georgia. (*Rec. p. 9.*) The defendant denied that the intestate had any interest or title in the premises in dispute, and set forth facts showing that it duly acquired title to the premises through an

execution sale upon a judgment procured against Godfred Keener, the father of the intestate, who at the time of the sale was the owner of the property in question and through whom the alleged title of the intestate was sought to be deraigned. (*Rec. pp. 11-17.*)

Agreed Facts.

The case was tried before the court, without a jury, in August, 1909, on an agreed state of facts, which are set forth (*Rec. pp. 13-18*), and are substantially as follows:

Godfred Keener, prior to his death, was the owner of the property in dispute. On May 20, 1857, he accepted a bill of exchange drawn on him by A. & T. S. Tharp, payable four months after that date, for the sum of $374.14, with current exchange. In May, 1858, Andrew Tharp and Thomas S. Tharp, constituting the firm of A. & T. S. Tharp, brought an action against Godfred Keener in the Superior Court of Troup County, Georgia, to recover the amount payable on this bill of exchange. Process issued in regular and usual form, and on May 28, 1858, Godfred Keener having confessed judgment for the plaintiffs in the sum of $380.88, with interest, judgment for that amount was entered against him accordingly.

This judgment was subsequently, at the May Term, 1873, of the Superior Court of Troup County, duly revived by *scire facias*, and a *fi. fa.* was issued on the revived judgment in August, 1873, under which the land in question was levied upon.

Godfred Keener was adjudged a bankrupt, on his own petition, in 1878, "and returned in his schedule of creditors the Tharp execution,". He was discharged some time in 1878. The Tharps never proved their claim in the bankrupt court, and received no payment on their *fi. fa.* The assignee of Keener undertook to set aside, as his bankrupt homestead, the property now in suit.

Godfred Keener died intestate in June, 1879, leaving five children, of whom Edwin, the intestate of the plaintiff in error, was one, he being of the age of twenty-one years at the time of his father's death.

In December 1879, after the death of Godfred Keener, the Sheriff of Troup County sold the property which had been set apart as a bankrupt homestead, at sheriff's sale, under the Tharp *fi. fa.*, after due advertisement, to Eugenia Peavy, one of the children of Godfred Keener, for $1500, she being the highest bidder. The administrator of the deceased was present at the sale, and gave no notice and made no objection to the sale, and the Sheriff executed and delivered a deed of conveyance to the purchaser, who took immediate possession of the property.

Mrs. Peavy sold the property to T. C. Crenshaw in September 1881, for $2500. On May 3, 1882, Crenshaw sold it to Mrs. M. E. Wright for $2,750, Crenshaw having in the meantime made improvements on the property. Mrs. Wright erected a brick warehouse upon the premises, and then sold them on March 8, 1888, to J. G. Truitt for $8,200, and on May 23, 1888, Truitt in turn sold and conveyed them to LaGrange Mills, the defendant in error. The latter thereupon erect-

ed an extensive cotton mill upon the premises, at a cost of $90,000, in which it installed cotton mill machinery of the value of $186,755. At the time of the trial the value of the land was $12,500.

Edwin Keener having been adjudged insane in 1876, was committed to the State asylum, and there remained until his death on November 4, 1903. His mother was likewise confined in the State asylum from 1869 to 1905, during which time she had assigned to her dower in the land in question, which was paid to her until her death.

The pleadings in the case are entirely silent as to the existence of a Federal question. The agreed facts do not indicate the nature of the bankruptcy proceedings referred to, or the court in which they were taken; nor is there anything to indicate that the court in which they were taken had jurisdiction. The record does not show that the court was called upon during the trial, to make any ruling upon any Federal question, by motion or otherwise.

The claims of the parties are referred to in one of the stipulations (*Rec. p. 14*) as follows:

"2nd. Plaintiff claims title under the bankruptcy act and all amendments thereto, including the act of Congress of March 3, 1873.

3rd. Defendant claims the sheriff's sale was legal under the law of Georgia, passing the title to the purchaser under whom it claims. The sale could not be void if in accordance with the law of this State, as decided by our Supreme Court in the following cases: * * *"

The trial court rendered judgment in favor of the defendant, there being no findings or adjudication indicating that any Federal question was passed upon. An appeal was taken to the Su-

preme Court of Georgia, and the assignments of error, appearing *Rec. p. 7*, contain no reference to any Federal question. The most explicit of them merely recites,

"that the property sued for was set aside to him [Godfred Keener] as a homestead in the bankrupt court, under the acts of Congress and the Constitution of the State of Georgia of 1868, that all of this was done in 1878 and 1879, that Godfred Keener died in possession of the property sued for in 1879, that Edwin Keener was insane at the time of said Godfred Keener's death, and so remainded ever since to the date of his death; that minor children of Godfred Keener were living at the time of the sale of said property by the Sheriff, said sale was void and did not divest the title of said Edwin Keener."

The Supreme Court affirmed the judgment unanimously, in an opinion appearing *Rec. p. 19*.

This judgment has been brought here on a writ of error by the original plaintiff (*Rec. p. 4*), who filed the assignments of error appearing *Rec. pp. 5 and 6*.

ARGUMENT.

I.

The record in the State courts did not properly present the Federal question which is now sought to be injected into the case by the assignments of error to this court.

As has been seen, the pleadings do not suggest a Federal question. No ruling upon such a question

was made by the trial court. The stipulations as framed do not necessarily indicate that the question now sought to be presented by the plaintiff in error was raised, or that it was necessary for the court to pass upon it in order to reach the conclusion which it did.

There is nothing in the record to show in what court the bankruptcy proceedings against Godfred Keener had been instituted, or that any court had such jurisdiction over him or his property as could affect the rights of the Tharps under their judgment and *fi. fa.* The assignments of error to the Supreme Court of Georgia do not present a Federal question, and the opinion of that court does not indicate that its judgment necessarily involved the propositions which are set forth in the assignments of error filed in this Court.

No presumption is to be indulged in favor of the existence of a Federal question. The plaintiff in error is to be held to strict proof, to establish the proposition that the precise question which he asks this Court to determine was presented to and necessarily passed upon by the State Courts. This is especially the case when one considers that this action was not commenced until twenty-eight years after the sale of the property in the Tharp action, twenty one years after the defendant in error acquired the property and expended upon it a huge sum of money, and not until four years after the death of the intestate of the plaintiff in error; when no question as to the good faith of the defendant in error in acquiring the property is even hinted at and when one considers the unbroken line of decisions of the Supreme Court of Georgia, which adjudicated that such a title as that which

the defendant in error acquired was unquestionably good.

The proper way to raise a Federal question is by a pleading, motion, exception or other action, made part of the record, showing that the claim was presented to the State court.

> *Loeb* v. *Columbia Township*, *179 U. S. 472.*
> *Mutual Life Ins. Co.* v. *Magrue*, *188 U. S. 309.*

The assertion of the right must be made unmistakably and not left to mere inference. It must be by averment so distinct and positive as to place it beyond question that the party bringing the case here from the State court intended to assert the Federal question, sought to be reviewed here, and the nature of such right should be distinctly pointed out.

> *Oxley Stave Co.* v. *Butler County*, *166 U. S. 648.*
> *Michigan Sugar Co.* v. *Michigan*, *185 U. S. 112.*
> *Dewey* v. *Des Moines*, *173 U. S. 193.*
> *Bolln* v. *Nebraska*, *176 U. S. 83.*

Federal questions cannot, for the first time, be introduced into a case, by the assignments of error presented to this Court.

II.

Even though it be assumed that, under the practice pursued by the plaintiff in error, an effective attempt was made to present a Federal question, yet, as matter of law, no such question has been presented.

The assignments of error on which the plaintiff in error apparently relies, are the following:

"2. The court erred in holding that the homestead exemption set apart in 1878 to Godfred Keener, bankrupt, was subject to a judgment founded on a debt contracted prior to the adoption of the Constitution of the State of Georgia of 1868."

"4. The court erred in holding that the sale of said homestead exemption in bankruptcy under an execution upon a judgment founded on a debt contracted prior to the adoption of the Constitution of 1868, was a valid sale, which conveyed the title from said bankrupt to the purchaser at such sale and her assigns."

"5. The court erred in not holding that said sale of said homestead exemption in bankruptcy was invalid and conveyed no title thereto to the purchaser at such sale, or her assigns."

"6. The court erred in holding that the act of Congress of March 3, 1873, which is substantially set forth in Section 5045 of the Revised Statutes * * * is void and of no effect."

"7. The court erred in not holding that said act of Congress was valid, and that under the provisions thereof the homestead exemption to Godfred Keener, bankrupt, was valid against the debt under which it was sold, and that the sale was invalid and passed no title to the purchaser or her assigns."

As a matter of fact, the record does not show that the court was requested to make any ruling

which involved the propositions set forth in the fifth, sixth and seventh assignments.

1. *The judgment below proceeded solely on the interpretation of the Georgia law pursuant to an express adjudication of this Court, the effect of which was to give to the local law a prospective operation, and depended therefore entirely upon the local and not upon any Federal law.*

A consideration of the authorities referred to in the opinion of the Supreme Court of Georgia, which, together with other Georgia decisions, will be more fully considered under the next subdivision of this argument, will show that that court had, prior to 1879, decided in a number of well considered cases, following the decision of this Court in *Gunn* v. *Barry*, *15 Wall. 610*, that, under the Constitution and laws of Georgia, enacted in 1868, which were given a prospective and not a retrospective interpretation, the property of a debtor was not exempt from sale under execution, on a judgment recovered prior to 1868 upon a contract obligation incurred before that time. It was therefore the local law of Georgia, interpreted in accordance with and enforcing a decision of this Court, that there was no homestead exemption in Georgia in a case like the present.

Inasmuch, therefore, as the amendment to the bankrupt law passed March 3, 1873, embodied in *Section 5045* of the *United States Revised Statutes*, which is quoted on *pages 36 and 37, infra*, granted exemption to a bankrupt only where the law of the State in which the bankrupt had his domicile at the time of the commencement of the proceedings in bankruptcy, and by that law, ap-

plied in conformity with a decision of this Court, such exemption did not exist as against the Tharp judgment and execution, there was no denial of any right arising under any Federal statute.

In *Telluride Power Co.* v. *Rio Grande &c. Ry. Co., 175 U. S. 639*, it was held that the jurisdiction of this Court, in cases brought up by writ of error to a State court, does not extend to questions of fact, or of local law, which are merely preliminary to, or the possible basis of, a Federal question. There an action was brought by the railway company against the power company to confirm and quiet the title of the plaintiff company to certain unsurveyed public lands of the United States in Utah. The railway company claimed authority to construct and operate a railroad in Provo Cañon, and commenced the survey and location of the line through the cañon, passing over certain tracts of unsurveyed lands of the United States, of which one Murphy was in possession, prior to the survey, and that it became the owner of this right of way under an act of Congress affirming such rights. The defendant claimed that it had taken possession of a large tract of these lands for the construction of a reservoir and other hydraulic purposes.

It was recognized that, if there was any Federal question in the case, it arose under *Section 2339* of the *Revised Statutes*, which provided:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged *by the local customs, laws and the decisions of courts*, the possessors and owners of such vested rights shall be maintained and protected in the same. * * *"

It was insisted that the case fell within the first category of cases specified in *Section 709* of the *United States Revised Statutes*.

There, as in this case, the assignments of error filed here, for the first time made formal and specific reference to an act of Congress as a basis of the right of the plaintiff in error. There was there no intimation that the District Court erred in the construction or applicability of any such act. The petition in error to this Court, for the first time set up a right and authority under the mining laws of the United States, and charged that the decision of the trial court, as well as of the Supreme Court of the State, was against the authority and validity of the claim of the defendants.

Referring to the Federal statute and the claims thereunder Mr. Justice Brown said:

"The question who had acquired this priority of possession was not a Federal question, but a pure question of fact, upon which the decision of the State court was conclusive. No construction was put upon the statute; no question arose under it; but a preliminary question was to be decided before the statute became material, and that was whether defendants were first in possession of the land. *Even if priority of possession had been shown, it would still have been necessary to prove that the defendants' right to the use of the water was recognized and acknowledged by the local customs, laws and decisions, all of which were questions of State law.* * * * But the difficulty in this case is that before it could be said that any right or title under a statute of the United States had been denied, it was necessary to establish as a question of fact, priority of possession on the part of the Telluride Company, as well as conformity to local customs,

laws and decisions. These were local and not Federal questions. *The jurisdiction of this court in this class of cases does not extend to questions of fact or of local law, which are merely preliminary to, or the possible basis of, a Federal question.*"

In *Telluride Power Co.* v. *Rio Grande &c. Ry. Co., 187 U. S. 569*, which was an action brought by the railway company to condemn land of the power company, in the exercise of the right of eminent domain under the laws of Utah, in one of the District Courts of that State, the local courts adjudged that the power company did not have possession of the lands sought to be condemned. It was claimed in the petition for writ of error, that the rights of the Power Company under *Section 2339* of the *United States Revised Statutes*, had been denied. The writ of error was dismissed on authority of the case last cited. The opinion of Mr. Justice McKenna quoted the following passage from the opinion of the Supreme Court of Utah:

"Under Section 2339, Revised Statutes, even if priority of possession of the property in question was shown in the defendant corporation, still its right to locate and use the water or land is not recognized or acknowledged by the laws of this State, and it was not in a position to question the right of the plaintiff in the premises."

The opinion of this Court then proceeds:

"From this excerpt it appears that the Supreme Court construed the statutes and Constitution of Utah, deciding that the power company had no existence as a corporation in the State, and could acquire, therefore, no rights as such,

and 'was not in a position to question the right of the plaintiff (defendant in error) in the premises.' These conclusions did not involve the decision of Federal questions. The first expressed the meaning and effect of local statutes. The second depended upon a finding of fact. Neither, therefore, is reviewable by us."

In *Long* v. *Bullard, 117 U. S. 617*, which came to this Court on error to the Supreme Court of Georgia, it appeared that land was set off, in 1869, under the laws of Georgia, to Betsey A. Long, the wife of Francis M. Long, as a homestead. It was then encumbered by a mortgage made by Francis M. Long to a building association. Proceedings were afterwards had to foreclose this mortgage, and to save the property from sale Long and his wife executed to one Bullard their joint note, dated November 18, 1872, and conveyed to him the homestead property by a deed absolute on its face as security. On May 29, 1873, Francis M. Long was adjudged a bankrupt, and on April 15, 1874, he received his discharge. In his schedules, the debt to Bullard was duly entered, but he did not prove his debt in the bankruptcy proceedings. On June 28, 1873, the same premises were set apart to the bankrupt, to be retained by him under the bankrupt law as being exempt under the State law from levy and sale upon execution. In an action thereafter brought by Bullard to subject the property to the payment of his debt, judgment was rendered in favor of Bullard. The Superior Court granted a new trial, and Bullard then took a writ of error to the Supreme Court of the State, where the judgment of the Superior Court was affirmed, unless the plaintiff in error re-

duced the amount of his verdict. When the case came back to the trial court the reduction was made and a decree was entered for the sale of the property to pay the amount of the reduced verdict. Long thereupon excepted to the decree, on the ground that the property so to be sold constituted his homestead, exempted, set apart, and secured to him by the bankrupt court of the United States, by virtue of Section 5045 of the Revised Statutes, as against the complainant's debt, and that such exemption was valid against the complainant's debt under and by virtue of the act of Congress, and that the decree charging the said exemption with the payment of the debt was in contravention and in violation of that act, and of his discharge in bankruptcy. Another writ of error from the Supreme Court was thereupon sued out, the decree was affirmed, and then the case came on writ of error to this Court. Chief Justice Waite, in the course of his opinion, said:

"Here the creditor neither proved his debt in bankruptcy nor released his lien. Consequently his security was preserved notwithstanding the bankruptcy of his debtor. *McHenry* v. *La Societe Francaise, 95 U. S. 58; Dudley* v. *Easton, 104 U. S. 99, 103; Porter Lazear, 109 U. S. 84, 86. The dispute in the court below was as to the existence of the lien at the time of the commencement of the proceedings in bankruptcy. That depended entirely on the State laws, as to which the judgment of the State court is final and not subject to review here.*"

In *Cramer* v. *Wilson, 195 U. S. 408*, an action which involved the title to property conveyed by one who became a bankrupt, a year before bankruptcy proceedings were instituted, as against one

who acquired title to the same property under the assignee's sale, Mr. Justice Brown said:

"We have repeatedly held that, when the question in a State court is not whether, if the bankrupt had title, it would pass to his assignee, but whether he had title at all, and the State court decided that he had not, no Federal question is presented. *Scott* v. *Kelly*, *22 Wall. 57*; *McKenna* v. *Simpson*, *129 U. S. 506*. The same principle was applied to a different class of cases in *Blackburn* v. *Portland Gold Mining Co.*, *175 U. S. 571*; *De Lamar's Co.* v. *Nesbitt*, *177 U. S. 523*."

In *Smalley* v. *Laugenour*, *196 U. S. 93*, an action of ejectment was brought in the Superior Court of the State of Washington, wherein the plaintiff claimed title under an execution sale, and the defendants by reason of a homestead exemption allowed in a bankruptcy proceeding. Judgment having been rendered in favor of the defendants, a writ of error was sued out from this Court on the theory that the case presented a Federal question arising under Section 6 of the present bankruptcy act, relating to exemptions. It was held by this Court that the writ of error should be dismissed, Chief Justice Fuller saying:

"The rights of a bankrupt to property as exempt are those given him by the State statutes, and if such exempt property is not subject to levy and sale under those statutes, then it cannot be made to respond under the act of Congress. * * * We are not able to perceive that the State Supreme Court denied in any way a right of plaintiffs in error specially set up or claimed under the Constitution or laws of the United States. All that was determined, and all that the State court was called on to determine, was the question of exemption under the State statutes."

See also

Tyler v. *Cass County, 142 U. S. 288.*

2. *The present case does not come within any of the categories of Section 709 of the United States Revised Statutes, now Section 237 of the Judiciary Code.*

(*a*) The decision of the Supreme Court of Georgia did not draw in question the validity of any statute of the United States, and did not decide against the validity of any such statute.

(*b*) It did not draw in question the validity of a State statute on the ground of repugnancy to the Constitution, treaties or laws of the United States, or a decision in favor of the validity of such State statute. On the contrary, so far as there was any decision with regard to the statutes or Constitution of the State of Georgia, such decision was against rather than in favor of their validity, and hence could not be reviewed here.

McKinney v. *Carroll, 12 Pet. 66.*
Commonwealth Bank v. *Griffith, 14 Pet. 56.*
Walker v. *Taylor, 5 How. 64.*

(*c*) The Supreme Court of Georgia did not decide against any title, right, privilege or immunity, expressly set up or claimed by either party under the Constitution or any treaty or statute of the United States.

3. *Under the bankruptcy act of 1867, the subject of homestead exemption did not come within the jurisdiction of the bankruptcy court, but, based as it was on State law, was to be determined by the State courts.*

In *Re Bass, 3 Woods, 382, s. c. 2 Fed. Cas. 1004,* Mr. Justice Bradley, referring to the right of homestead exemption under the Constitution and laws of Georgia, said:

"Not only is all property exempted by State laws, as those laws stood in 1871, expressly excepted from the operation of the conveyance to the assignee, but it is added in the section referred to, as if *ex industria*, that 'these exceptions shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignee, and in no case shall the property hereby excepted pass to the assignee or the title of the bankrupt thereto be impaired or affected by any of the provisions of this title.' In other words, it is made as clear as anything can be that such exempted property constitutes no part of the assets in bankruptcy. The agreement of the bankrupt in any particular case to waive the right to the exemption makes no difference. He may owe other debts in regard to which no such agreement has been made. But whether so or not, it is not for the bankrupt court to inquire. The exemption is created by the State law, and the assignee acquires no title to the exempt property. If the creditor has a claim against it he must prosecute that claim in a court which has jurisdiction over the property, which the bankrupt court has not. Nor does it make any difference that the homestead was not ascertained or set out in severalty until after the proceedings in bankruptcy were commenced, or until after the conveyance to the assignee was executed."

A homestead belonging to a bankrupt never comes within the jurisdiction of the bankrupt court, but should be included in the assignee's report of exempt property; and a creditor having a lien upon it may enforce such lien notwithstanding the pendency of the bankrupt proceedings.

In Re Sinnett, 4 Sawy. 250.

A homestead set apart to a bankrupt, and approved, passes out of the jurisdiction of the bankrupt court. Any claims against it superior to the exemption must be enforced against the bankrupt in a court of competent jurisdiction and not against the assignee by petition to the bankrupt court.

Phillips v. *Bass, 65 Ga. 427.*

In *Lockwood* v. *Exchange Bank, 190 U. S. 294,* it was held that, under the bankruptcy act of 1898, the title to property of a bankrupt which is generally exempted by the law of the State in which the bankrupt resides, remains in the bankrupt and does not pass to the trustee, and the bankrupt court has no power to administer such property even if the bankrupt has, under a law of the State waived his exemption in favor of certain of his creditors. The fact that the act confers upon the bankruptcy court the power to control exempt property in order to set it aside does not mean that the court can administer and distribute it as an asset of the estate. The two provisions of the statute must be construed together and both be given effect. In the opinion of Mr. Justice White, the language of Mr. Justice Bradley *in Re Bass, supra,* was quoted with approval.

III.

The decision of the state court, that the Tharp judgment and fi. fa., based upon a contract entered into prior to 1868, were superior to the homestead exemption sought to be secured by the judgment debtor, was correct.

(1) *If the Bankrupt Act as amended in 1873 had undertaken to destroy the vested lien of the Tharp judgment it would have violated the Fifth Amendment.*

Under the laws of Georgia in force in 1879, and for many years prior thereto, all judgments obtained in the Superior, Justice's, or other courts of the State, were of equal dignity and bound all the property of the defendant, both real and personal, from the date of their recovery.

Act of 1799, p. 494.
Act of 1810, p. 495.
Code of Georgia, §3580.
Bush vs. *Lester, 55 Ga. 579.* (See *Opinion, pp. 27-29, infra.*)

The Tharp judgment was, therefore, a lien on Keener's property from the time of its recovery, and that lien gained in effectiveness by the issuance of the *fi. fa.* This judgment and the lien secured thereby, constituted property, which came under the protection of the Fifth Amendment to the Constitution of the United States, which forbade that any person should be deprived of life, liberty or property without due process of law.

That the lien of such a judgment comes within the purview of such a constitutional provision, has been frequently decided.

Thus, in *Gilman* v. *Tucker, 128 N. Y. 190,* in which Mr. Justice Hughes was of counsel, it was held that after judgment has been rendered in an action, the fruits thereof are rights of property and are beyond the reach of legislative power to affect, and that a statute which assumed to nullify a final and unimpeachable judgment, or to render it unenforceable, violated this constitutional prohibition.

In *Germania Savings Bank* v. *Suspension Bridge, 159 N. Y. 362,* Judge Vann, referring to a statute which sought to grant a right of appeal from a judgment after the period fixed by the statute for the taking of an appeal had expired, said:

"A judgment is a contract which is subject to interference by the courts so long as the right of appeal therefrom exists, but when the time within which an appeal may be brought has expired, it ripens into an unchangeable contract and becomes property, which can be disposed of or affected only by the act of the owner, or through the power of eminent domain. It is, then, beyond the reach of legislation affecting the remedy, because it has become an absolute right which cannot be impaired by statute."

In *Matter of Greene, 166 N. Y. 485,* which involved a similar statute, Judge Landon said:

"The legislature has control of remedies by which final judgments may be obtained, but cannot confiscate, recall or put again in jeopardy the rights and property established by judgments already obtained."

In *Merchants Bank of Danville* v. *Ballou*, *98 Va., 112, s. c. 44 L. R. A. 306*, Mr. Justice Harrison said:

"There can be no doubt that a judgment is such a vested right of property that the legislature cannot, by a retroactive law, either destroy or diminish its value."

After referring to *Gilman* v. *Tucker*, *supra*, the opinion proceeded:

"In the case last cited the power of the legislature to pass retroactive legislation affecting a judgment is denied, and in discussing the subject it is said: 'We must bear in mind that a judgment has been rendered, and the rights flowing from it have passed beyond the legislative power, either directly or indirectly, to reach or destroy it. After adjudication the fruits of the judgment become the rights of property. These rights became vested by the action of the court, and were thereby placed beyond the reach of legislative power to affect.'"

The opinion then proceeds:

"It is, however, contended that the effect of the statute in question is not to impair the validity of the judgment, but only to modify the remedy for its enforcement. In other words, that though the judgment itself is a vested right, that cannot be impaired or diminished by a retroactive law, yet the lien is not a vested right, but only a remedy provided for enforcing the judgment, which can be taken away by such a law. This position is not tenable. The right to the lien upon the debtor's real estate is in many cases the sole inducement to the credit which constitutes the basis of the judgment. Without the benefit of that lien, guaranteed by the law, at the time the judgment is taken, the credit would not have been given."

In *Cooley's Constitutional Limitations, 5th Ed. p. 440*, it is said, that a right to be vested, "must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another."

(2) *Prior to the passage of the act of March 3, 1873, this Court had decided that the homestead exemption provision of the Georgia Constitution of 1868 and the laws passed thereunder, was unconstitutional as to judgments circumstanced as was the Tharp judgment, and its interpretation was accepted by the Georgia courts.*

This Court in December, 1872, decided *Gunn* v. *Barry, 15 Wall. 610*, which arose on a writ of error to the Supreme Court of Georgia. There, it was shown that, in the process of the reconstruction of the State of Georgia, a Constitution had been adopted in 1868, which was, as required, submitted for approval to Congress. This Constitution contained this provision, upon which the Keener exemption is now sought to be based:

"Each head of a family, or guardian, or trustee of a family, of minor children shall be entitled to a homestead of realty to the value of $2,000 in specie, and personal property to the value of $1,000 in specie, to be valued at the time they are set apart."

It further provided:

"And no court or ministerial officer in this State shall ever have jurisdiction or authority to enforce any judgment, decree, or execution

against said property so set apart, including such improvement as may be made thereon from time to time, except for taxes, money borrowed or expended in the improvement of the homestead, or for the purchase money of the same, and for labor done thereon, or material furnished therefor, or removal of incumbrances thereon."

The Constitution was approved by Congress, and in due time became operative. By an act of the legislature of Georgia, passed October 3, 1868, the terms of the constitutional provision with regard to homestead exemption, were enacted as a part of the statute law of the State.

Gunn had obtained a judgment against one Hart in May, 1866. The judgment became a lien on a tract of land belonging to Hart, which was worth $1300. He had no other land but one piece worth about $100. On requirement by Gunn to Barry, who was the sheriff of the county where the property was located, to levy upon this tract of land, Barry refused to do so, on the ground that it had been set off to Hart and his family under the Act of 1868. On a petition for mandamus against Barry to compel him to make the levy, the courts of Georgia sustained the action of Barry. This Court, however, reversed the judgment of the State courts, holding that the exemption provision of the Constitution of 1868, and the acts passed thereunder, were unconstitutional in that they impaired the obligation of a contract in so far as they affected the right of Gunn to enforce his judgment which had been obtained and which was a lien upon the so-called homestead property at the time of the enactment of the State Constitution. Mr. Justice Swayne said:

"The effect of the act in question, under the circumstances of this judgment, does not indeed merely impair, it annihilates the remedy. There is none left. But the act reaches still further. It withdraws the land from the lien of the judgment, and thus destroys a vested right of property which the creditor had acquired in the pursuit of the remedy to which he was entitled by the law as it stood when the judgment was recovered. It is in effect taking one person's property and giving it to another without compensation. This is contrary to reason and justice and to the fundamental principles of the social compact. But we must confine ourselves to the constitutional aspect of the case. A few further remarks will be sufficient to dispose of it. It involves no question which has not been more than once fully considered by this court. * * * Though her constitution was sanctioned by Congress, this provision can in no sense be considered an act of that body. The sanction was only permissive as a part of the process of her rehabilitation, and involved nothing affirmative or negative beyond that event. If it were express and unequivocal, the result would be the same. Congress cannot, by authorization or ratification, give the slightest effect to a State law or Constitution in conflict with the Constitution of the United States. That instrument is above and beyond the power of Congress and the States, and is alike obligatory upon both. A State can no more impair an existing contract by a constitutional provision, than by a legislative act; both are within the prohibition of the National Constitution.

The legal remedies for the enforcement of a contract, which belong to it at the time and place where it is made, are a part of its obligation. A State may change, provided the change involve no impairment of a substantial right. If the provision of the Constitution, or the legislative act of a State, fall within the category last mentioned, they are to that extent utterly void. They are, for all the purposes of the contract which they

impair, as if they had never existed. The constitutional provision and statute here in question, are clearly within that category, and are, therefore, void."

In *Edwards* v. *Kearzey*, *96 U. S. 595*, it appeared that Edwards brought an action of ejectment against Kearzey. The lands which were sought to be recovered had been levied upon and sold by the Sheriff by virtue of executions issued upon judgments rendered against Kearzey on contracts maturing before April 24, 1868, when the Constitution of North Carolina took effect, the Tenth Article of which exempted from sale under execution every homestead and the dwelling and buildings used therewith, not exceeding in value $1,000, to be selected by the owner thereof. The lands in question were owned and occupied by Kearzey as a homestead, and were set off to him pursuant to the legislation enacted to carry the constitutional provision into effect. Edwards purchased the property at the Sheriff's sale, receiving a deed therefor. This Court, reversing a judgment in favor of Kearzey, held that the remedy subsisting in a State when and where a contract is made and is to be performed, is a part of its obligation, and that any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract, is forbidden by the Constitution of the United States, and is void. Mr. Justice Swayne said:

"It is also the settled doctrine of this court, that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or

incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge and enforcement."

See also,

Wilson v. *Brochon, 95 Fed. Rep. 82.*

White vs. *Hart, 13 Wall. 654* was a previous decision by this Court construing a similar provision of the Georgia Constitution of 1868 and declaring it unconstitutional.

See also *Osborn* vs. *Nicholson, 13 Wall. 654.*

In *Chambliss* v. *Jordan, 50 Ga. 81,* decided at the July Term, 1873, the sole question involved related to the constitutionality of the Homestead Laws of 1868, as against antecedent debts. The lower court had held the act constitutional, but the Supreme Court, following the decision in *Gunn* v. *Barry, supra,* reversed the judgment, holding that the debtor was entitled to his homestead, but subject to the appellant's debt, which had been contracted before the date of the adoption of the Constitution of 1868.

In *Grant v. Cosby, 51 Ga. 460,* decided at the January Term, 1874, it was again held that the purchaser of a homestead set apart under the Laws of 1868, took it subject to any judgments against the head of the family existing at the time of the purchase, if they were founded on contracts entered into by him previously to the adoption of the Constitution of 1868.

In *Wofford* v. *Gaines, 53 Ga. 485,* decided at the July Term, 1874, the same doctrine was again laid down and was applied to a case where a promissory note given by the judgment debtor had gone into the hands of a third person, and whilst he

was the owner of it was renewed by the maker and a surety added, the new note being made payable to the holder. This it was held did not constitute such novation as to create a new debt not in existence in July, 1868, when the homestead law was adopted.

In *Bush* v. *Lester, 55 Ga. 579*, decided in 1876, it was held that land set apart to a bankrupt as exempt was protected from levy and sale under a prior judgment to the same extent only as it would have been protected by the homestead and exemption laws had no proceeding in bankruptcy taken place. Judge Bleckley said:

"By the laws of Georgia a judgment has a lien from its date upon all the property of the defendant: Code, section 3580. Is this lien extinguished by the defendant's discharge in bankruptcy? This Court has ruled that it is not: *Jones* vs. *Lellyett & Smith, 29 Georgia Reports 64; Phillips* vs. *Bowdoin, 52 Ibid, 547; Barber* vs. *Terrell, 54 Ibid, 146.* Several other cases decided by this Court tend to show that judgment liens which attached prior to proceedings in bankruptcy are unaffected, unless the creditor has proved his claim or the property sought to be reached has been taken charge of by the assignee and administered free from liens in the manner provided for by the bankrupt act: 40 Georgia Reports, 257; 43 Ibid, 383; 44 Ibid, 133; 52 Ibid, 593. Comparing these cases with 49 Georgia Reports, 361; 52 Ibid, 605 and 53 Ibid, 208, it will be seen that the lien of a judgment has been regarded by this Court as on as high grounds as that of a mortgage. Both classes of liens seem to have been considered as equally within the saving provisions of the 20th section of the bankrupt act, and as adhering to the property in any and all hands, even those of the assignee. In one of the cases cited (40 Georgia Reports, 257) the court say that title passes to

the assignee, but he takes it subject to the lien; and in another (43 Georgia Reports, 383) they say the lien is preserved, and it is at the option of the plaintiff to proceed with his execution or go into the bankrupt court and prove his debt. The assignee may compound for a release of the lien, or he may sell subject to it, or, by an order of his court to that effect, may sell free from it. But if he sells without compounding or obtaining the requisite order, the lien, if not in some way waived, will still bind the property: *Meeks* vs. *Whatley, 10 Bank Reg. 498.* See also as to lien for taxes, even where there was an order to sell free from incumbrances, and the assignee sold accordingly; 46 Georgia Reports, 412 * * * A distinction is sought to be drawn between enforcing a judgment after bankruptcy, against property never in any way dealt with by the assignee or by the bankrupt court, and enforcing it against property set apart in due form to the bankrupt as exempt, whether exempt legally as against such judgment or not. This latter is said to be administered in bankruptcy, and the former not. The distinction is unsound in so far as it is applied to exemptions measured by the state laws, and of that class is the exemption of land. The assignee acquires no title and imparts none to the bankrupt. He admeasures or values, and allows the bankrupt to retain. The latter has precisely the same title after his exempt property is set apart as he had to it before. Liens upon it are neither extinguished nor removed. His protection thereafter, as to those liens, unless he can show assets for them in the hands of the assignee, depends wholly on the state law. What has been done by the assignee is equivalent to compliance with the state statutes in assigning homestead or claiming exemption, but has no higher validity or greater sanctity. If creditors come who have compounded their liens with the assignee, or who have proved their claims in bankruptcy they can be resisted. If others come who have not done so,

they can enforce their liens or not, according as they might or might not have enforced them against the same property if it had been set apart under the state law, in the method prescribed by that law, without any proceeding in bankruptcy whatever. Exemption granted in bankruptcy resting on the state law has precisely the same effect against prior liens as exemption granted out of bankruptcy, or by the instrumentalities appointed by the state. In respect to the latter, it is well settled by repeated rulings, that a creditor having a lien that overrides the exemption may assert it without contesting the right with the debtor on the hearing of his application: *44 Georgia Reports, 14, 663; 47 Ibid., 453; 39 Ibid., 386; 49 Ibid., 380; 50 Ibid., 81, 626; 51 Ibid., 460; Wofford v. Gaines, 53 Ibid., 485.* In 52 Georgia Reports, 605, a mortgagee was allowed to foreclose after the property mortgaged was set apart to the mortgagor, in bankruptcy, as exempt. The bankrupt act preserves all liens alike, and the debtor's discharge is granted with that implied qualification. What each lien will bind (beyond what is disengaged from it by the act without reference to the state law) depends upon the exemption laws of the state.

3. According to the laws of this state the lien of a judgment rendered in 1867 will prevail (where there is no bankruptcy) over the enlarged exemptions provided for by the constitution of 1868. This proposition is not now disputed; and if it were, the cases already cited in this opinion on other points, would place it beyond question. The principle of uniformity which the bankrupt act has observed with regard to the main bulk of its exemptions, is to adopt the laws of the several states, with a maximum limit to the amount exempted by the laws in force in 1871. There was, in 1871, no law of this state which accorded to judgment debtors, on debts dating in 1867, these large exemptions. We hold with the chief justice of the United States (*in re* Daniel Deckert, 10 B. Reg. 1,) that the amending act of March 3, 1873,

was unsuccessful in making unconstitutional provisions in state laws a part of the system of bankruptcy: See, also, the opinion of Ballard, Judge, in 13 B. Reg. 183. It was competent for congress either to have passed one uniform original law of exemption, irrespective of state laws, or to have adopted the latter as they were of force, or might become of force, within the several states; but it was not competent, we think, for it to impart to one or all of the latter, a force in the courts of the United States which, as solemnly decided by the supreme court of that government, they do not have, never did have, and never can have in the domestic tribunals of the states which enacted them. As to debts contracted prior to July, 1868, the true and only law of Georgia, measuring exemptions, is the Code. That was the law in force here in 1871; and no other exemption law of the state of Georgia was then operative upon the class of debts in question, and has not been since, and never can be. Without some law, either state or federal, there can be no exemption, even in bankruptcy. The constitution of 1868 was, as to debts older than itself, no state law in 1871 and is none now. Congress, by engrafting it upon the bankruptcy system, made it federal law so far as it was state law, and no further. Not the words of it but the legal essence of it passed into the statutes of the United States. It is the same law in them as out of them; and ought to receive the same construction and have the same effect. The only change is, that since its adoption by congress it is the law of two governments instead of one; and this principle of uniformity which saves the present bankruptcy system from being unconstitutional."

In *Hiley* v. *Bridges*, *60 Ga. 375*, decided at the January Term, 1878, it appeared that the land of Jacob Hiley was levied upon under a judgment based on a debt created prior to the Constitution of 1868, judgment being rendered on December

14, 1868. Execution issued thereon was levied on the land on April 8, 1873. The claim was interposed by Jacob Hiley, as trustee for his wife and children, that since the rendition of judgment he had been declared a bankrupt and had received his final discharge, but the plaintiff in the execution proceedings had not proved his debt in bankruptcy, or done anything to aid his lien, or submit it to the jurisdiction of the bankrupt court. On these facts it was held that the land was subject to the execution levied thereon.

In *Dixon* v. *Lawson*, *65 Ga. 661*, the setting apart of a homestead under the Georgia Constitution, even though afterwards confirmed in the bankrupt court, was again held not to protect the property from a judgment rendered before 1868, and before the United States bankrupt law.

In *Shipp* v. *Smith*, *76 Ga. 1*, decided at the October Term, 1885, it appeared that Shipp became indebted to Smith by a contract entered into in 1862. This was reduced to a gold basis on February 21, 1867. Judgment was obtained thereon in August, 1872. In 1873 the defendant was adjudicated a bankrupt, and afterwards was discharged. Smith never proved his debt in bankruptcy. The land levied on was set apart as a homestead under the Constitution of 1868, and afterwards was set apart as an exemption in bankruptcy, as being the homestead allowed by the State Constitution of 1868. It was nevertheless held that the property was subject to sale under execution issued on the judgment so obtained, Chief Justice Jackson saying:

"This case is fully covered by the ruling of this Court in Bush *v.* Lester, 55 Ga. 579, 582, 583. This Court there followed Chief Justice Waite (*in re* Daniel Deckert, 10 Bank. Reg. 1) [7 Fed. Cas. 334] in holding 'that the amending act of March 3, 1873, was unsuccessful in making unconstitutional provisions in State laws a part of the system of bankruptcy.' It was the unanimous opinion of the Court then, and it not being requested to be reviewed now, and the Supreme Court of the United States not having decided the contrary, so far as we know, this Court, as now organized in its personnel, must follow that case. The debt having been contracted prior to the Constitution of 1868, could not have been defeated by a homestead under it by the State law; and that ruling being that the effort of Congress to defeat it by the amending act of 1873 is inoperative, the Court below was right to find the homestead subject to the debt, though the exemption of the property was made by the bankrupt court."

In *Dozier* v. *McWhorter*, *113 Ga. 584, s. c. 39 S. E. Rep. 106* decided May 24, 1901, judgment was obtained by Dozier against Wilson on November 23, 1876. Wilson was adjudged a bankrupt on August 7, 1878. The land in dispute was set apart to him as a homestead under the bankrupt law. It was never set apart as a homestead under the State law. Dozier did not prove his debt in the bankrupt court. Mr. Justice Cobb said:

"Property set apart to a bankrupt as exempt under the bankrupt act of 1867 remained subject to the lien of a judgment the holder of which did not prove his debt in bankruptcy, nor participate in any distribution of the bankrupt's estate; but the right to enforce the lien was withheld until such time as, under the State law, property set

apart as a homestead could be lawfully levied upon."

It is thus evident, that the several Georgia decisions which have just been cited in the interpretation of the local law merely carried into effect the decision rendered by this Court in *Gunn* v. *Barry*, which declared that the provision for homestead exemption contained in the Constitution and laws of Georgia, adopted in 1868, had no application to a claim for homestead exemption as against a judgment procured prior to 1868 based on a contract obligation, and, so far as such a judgment was concerned, were non-existent.

As has been seen, the interpretation given to the Georgia Constitution and laws in *Gunn* v. *Barry*, and *White* vs. *Hart*, was followed with regard to the North Carolina Constitution in *Edwards* v. *Kearzey*, *supra*. It was also in line with the decision in *The Homestead Cases, 22 Grattan, 266*, rendered by the Supreme Court of Virginia with regard to a similar provision in the Constitution of that State.

There can be no doubt that, in the absence of the bankruptcy law, the provisions of the Georgia Constitution and laws of 1868, relating to homestead exemption, were not applicable to a judgment circumstanced as was the Tharp judgment, under which the defendant in error derives its title to the property now in litigation. The interpretation given to the Georgia Constitution and laws in *Gunn* v. *Barry*, *supra*, became a part of such Constitution and laws at the time of the amendment of the bankruptcy act of March 3, 1873, and therefore the exemption given by the laws of the State in which Keener had his domicile

at the time of the commencement of the proceedings in bankruptcy in which he was involved, did not afford him any exemption as against a judgment based on a contract which had its inception prior to 1868. The decision which brought about such an interpretation of the Georgia statute was not that of the State courts rendered after the adoption and passage of the Constitution of 1868—those courts had originally enforced the Constitution of 1868 literally—but it was a decision of this Court which brought about the modification of the Georgia Constitution and homestead exemption statutes of 1868.

The subsequent decisions of the Supreme Court of Georgia, including that in the present case, if the latter is to be deemed to have involved a determination of the proposition which the plaintiff in error is seeking to raise at the present time, merely dealt with the Constitution and laws of 1868 as this Court had directed, and in accordance with its decision, and adopted the interpretation of the local law, which this Court declared consonant with the Constitution of the United States.

As an indication that this was recognized as the State policy of Georgia, *Article IX* of the *Constitution of Georgia of 1877*, relating to homestead exemptions, in *Section 8* thereof, expressly provided: "Rights which have become vested under previously existing laws shall not be affected by anything herein contained." And paragraph V. of *Article XII* of that *Constitution*, further declared:

"All rights, privileges and immunities which may have vested in or accrued to any person or persons, or corporation, in his, her or their own right, or in any fiduciary capacity, under and in

virtue of any act of the General Assembly, or any judgment, decree, or order or other proceeding of any court of competent jurisdiction in this State, heretofore rendered, shall be held inviolate by the courts before which they may be brought in question, unless attacked for fraud."

3. *There is no merit in the contention that the Georgia decisions to which we have referred are in contravention and disregard of the bankruptcy act in force at the time of the sale of Keener's property under the Tharp judgment and execution.*

THE PROVISIONS OF THE BANKRUPT ACT OF 1867, AS AMENDED.

Section 14 of the *Bankruptcy Act of 1867* after providing that upon the appointment and qualification of an assignee all of the estate, real and personal, of the bankrupt was to be assigned and conveyed to the assignee, and that the title thereto would vest in him, contained the following proviso:

"Provided, however, That there shall be excepted from the operation of the provisions of this section:—

The necessary household and kitchen furniture, and such other articles and necessaries of such bankrupt as the said assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances, of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars;

And also the wearing apparel of such bankrupt, and that of his wife and children;

And the uniform, arms, and equipments of any person who is or has been a soldier in the militia or in the service of the United States;

And such other property as now is, or hereafter

shall be exempted from attachment, or seizure, or levy on execution by the laws of the United States;

And such other property not included in the foregoing exceptions as is *exempted from levy and sale upon execution or other process, or order of any court, by the laws of the State in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such State exemption laws in force in the year eighteen hundred and sixty four:*"

By the amendatory act passed on June 8, 1872, the last paragraph of the proviso just quoted was changed so as to give the bankrupt the benefit of the exemption laws in force in 1871.

By a subsequent amendatory act, passed March 3, 1873, which was practically re-enacted as *Section 5045* of the *United States Revised Statutes*, the final paragraph above quoted was amended so as to read as follows:

"And such other property as now is, or hereafter shall be, exempted from attachment, or seizurze, or levy on execution by the laws of the United States, and such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process or order of any court by the laws of the State in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount allowed by the constitution and laws of each State, as existing in the year eighteen hundred and seventy-one; and such exemptions shall be valid against debts contracted before the adoption and passage of such State constitution and laws, as well as those contracted after the same, and against liens by judgment or decree of any State court, any decision *of any such court* rendered since the adoption and passage of such constitution and laws

to the contrary notwithstanding. These exceptions shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignee; and in no case shall the property hereby excepted pass to the assignee, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this Title; and the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of the said court."

Section 6 of the *Bankruptcy Act of 1898* provides:

"This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months, or the greater portion thereof, immediately preceding the filing of the petition."

The bankrupt act, in its relation to judgments similar to the Tharp judgment, came up for consideration in various of the Federal courts shortly after the passage of the amendment of March 3, 1873, where, in recognition of the doctrine of *Gunn v. Barry*, the interpretation given by that decision, and adopted by the several State courts affected, in obedience to that adjudication was recognized as sound.

In *Re Dillard, 2 Hughes 190, s. c. 7 Fed. Cas. 703*, decided by the Circuit Court for the Eastern District of Virginia, in October, 1873, it was held that the amendment of March 3, 1873 to the bankruptcy act, merely permitted the exemptions granted by the state laws in 1871 as against judgments of state courts, when such judgments were rendered after the passage of the amendment of 1873. Judge Bond said:

"The claim is, that under the provisions of the act of March 3, 1873, the bankrupt is entitled to the exemption allowed by the act of assembly of Virginia, commonly known as the homestead exemption, passed June 27, 1870, and that this homestead exemption has precedence of, and is paramount to, the liens of the judgment creditors. * * * Under this view * * * all bankrupts who have been adjudicated such since the passage of the act of the general assembly of Virginia, passed June 27, 1870, commonly known as the 'Homestead Act,' are to be allowed the exemption provided therein against all claims of creditors created subsequent to its passage. The supreme court of the state has determined there is no property in Virginia exempt from levy and execution upon debts created antecedent to the passage of that statute, and therefore there can be none under the bankrupt law, which follows the exemption laws of the states. So far this court has held heretofore. It is insisted now, however, that the act of March 3, 1873, has modified the bankrupt law in this respect. It is argued that since the passage of that act the exemption allowed by law is that exemption which was provided by state laws of 1871, and that this exemption shall take precedence of and be paramount to all liens by judgment or decree of any state court. So far as this act of March 3, 1873, is declaratory of the meaning of the bankrupt law, of which it is an amendment, it is void. If it declare the law to mean what the courts have already construed it to mean, then it is useless. If it undertake to construe the bankrupt act and its amendment differently from the courts, it is void. To declare what the law is, or has been, is a judicial function. To declare what it shall be hereafter is legislative. Cooley, Const. Lim. 94. There have already been numerous decisions of the United States courts construing these exemption clauses in the bankrupt act. To test the soundness of these decisions, the appeal is to the appellate courts of the United States, but not to

congress. Prior to the act of 8th June, 1872, the exemption allowed a bankrupt both as to amount and the estate out of which it was to be taken, and the description of person to whom it was to be allowed was fixed by state laws in force in 1864. The bankrupt act was decided to be uniform by reason of this characteristic. Such state laws as were in force in 1864, governed, in these three respects, the allowance of exemption in bankrupt courts. The act of 1872 merely changed the date to embrace state laws of exemption in force in 1871. But who was to have exemption, out of what property, and to what extent, remained unaltered, the declaratory part of the act of 1873 to the contrary notwithstanding.

"It is contended at bar that the act of March 3, 1873, is not an act which gives wider scope or more force to the state exemption laws, which heretofore have been the only authority for homestead exemption in the bankruptcy courts, but that it, itself, provides a statutory exemption paramount to all liens of judgment and decrees of whatever date, and is only limited in amount by the provision of the state statute. If the act of March 3, 1873, intends to give the state exemption laws *qua* state laws a force and power which the state could not give them, then it is void, because it has been decided by the supreme court in *Gunn* v. *Barry* (15 Wall. 82 U. S. 610), that to give a bankrupt an exemption from debts or liens created antecedent to the passage of the exemption law is to impair the obligation of a contract. This the states are forbidden to do by the constitution of the United States. No act of congress can enable them to do it, in the face of this constitutional provision, by declaring that state statutes shall have this force. If it be maintained, on the other hand, that the act of March 3, 1873, although it refers to the act of 1872, itself an amendment to the bankrupt act, which had always been construed as directing the bankrupt court to look to the exemption law of the states for the description of person who might claim exemption, and for the amount and species

of property to be exempted, provided a direct statutory exemption of so much property in value as was exempted by state laws, and that this exemption was to override and be paramount to all antecedent liens of judgments and decrees, we meet this difficulty. * * * We must not, if we can avoid it, give to the act of congress such a construction as would be contrary to reason and justice. We must not suppose they intended to violate the fundamental principles of the social compact. Yet to say congress has provided, by the act of March 3, 1873, that every bankrupt shall have his property restored to him, freed from the liens vested in his creditors prior to the passage of that act, is to hold that they have done as the legislature of Georgia had done, *i. e.*, enacted a law contrary to reason and justice, and, in the view of the supreme court, subversive of the fundamental principles of the social compact. *Gunn* v. *Barry* (*supra*). Such a view cannot be ascertained. There is but one other construction to be given to the statute, and that is, that like all statutes it is prospective. The statute itself, after declaring what 'should' or ought to be the exemption, declares that such it 'shall be' in future, *i. e.*, after the passage of that act; that it is intended to provide that no judgment or decree of any state court, rendered after the passage of that act, shall debar a bankrupt of his exemption to the extent allowed him under the statutes of the state where he resides. This can be promotive of no hardship. Every creditor will know what, in future, is the effect of his judgment lien acquired since the passage of the act of March 3, 1873. Every decree of a state court to enforce the payment of a debt, or the obligation of a contract, created or entered into since the passage of the act, will be made in view of the supreme law. The statute of Virginia gives an exemption out of the property of the bankrupt. It does not give it to him out of other people's property. Where his property is incumbered by a lien, it is only the bankrupt's *sub modo*. The lien creditor, in the language of the supreme

court, has a vested interest in it also, and the bankrupt can only be allowed an exemption out of such estate as remains to him after the vested interests of others have been satisfied."

In *Re Deckert*, 2 *Hughes* 183, s. c. 7 *Fed. Cas.* 334, which also arose in the Circuit Court for the Eastern District of Virginia, in 1874, Chief Justice Waite likewise had occasion to construe the amendatory act of 1873, saying:

"The first question which presents itself for our consideration is whether the act of 1873, in so far as it seeks, in the administration of the bankrupt law, to give an effect to the exemption laws of a state different from that which is given by the state itself, is constitutional. Congress has power to 'establish uniform laws on the subject of bankruptcies throughout the United States.' Const. art. 1, Sec. 8. A bankrupt law, therefore, to be constitutional, must be uniform. Whatever rules it prescribes for one it must for all. It must be uniform in its operations, not only within a state, but within and among all the states. If it provides that property exempt from execution shall be exempt from assignment in one state, it must in all. If it specially sets apart for the use of the bankrupt certain property, or certain amounts of property in one state, without regard to exemption laws, it must do the same in all. If it provides that certain kinds of property shall not be assets under the law in one place, it must make the same provision for every other place within which it is to have effect. The power to except from the operation of the law property liable to execution under the exemption laws of the several states, as they were actually enforced, was at one time questioned, upon the ground that it was a violation of the constitutional requirement of uniformity, but it has thus far been sustained, for the reason that it was made a rule of the law, to subject

to the payment of debts under its operation only such property as could by judicial process be made available for the same purpose. This is not unjust as every debt is contracted with reference to the rights of the parties thereto under existing exemption laws, and no creditor can reasonably complain if he gets his full share of all that the law, for the time being, places at the disposal of creditors. One of the effects of a bankrupt law is that of a general execution issued in favor of all the creditors of the bankrupt, reaching all his property subject to levy, and applying it to the payment of all his debts according to their respective priorities. It is quite proper, therefore, to confine its operation to such property as other legal process could reach. A rule which operates to this effect throughout the United States is uniform within the meaning of that term, as used in the constitution. The act of 1873 goes further, and excepts from the operation of the assignment not only such property as was actually exempted by virtue of the exemption laws, but more. It does not provide that the exemption laws as they exist shall be operative and have effect under the bankrupt law, but that in each state the property specified in such laws, whether actually exempted by virtue thereof or not, shall be excepted. It in effect declares by its own enactment, without regard to the laws of the states, that there shall be one amount or description of exemption in Virginia and another in Pennsylvania. In this we think it is unconstitutional, and therefore void. It changes existing rights between the debtor and creditor. Such changes, to be warranted by the constitution, must be uniform in their operation. This is not. The consequence is that the act of 1872 remains unchanged, notwithstanding its attempted amendment in 1873. The act of 1872 gives effect to the exemption laws of Virginia as they existed in 1871. The particular law under which the bankrupt in this case claims his exemption was passed in 1870; it does not apply to contracts made or debts incur-

red previous to the time the new constitution went into effect. That certainly was not before July 6, 1869, and the debts due to Smith, Wanderlink, and Shindel, were all incurred previous to that date. That of Smith dates from the time the note was given upon which his judgment was rendered, that of Shindel from the making of the contract out of which the indebtedness arose, and that of Wanderlink from the time of the execution of the note which he holds. As against these creditors, the bankrupt is not entitled to the benefit of the exemption."

In *Re Shipman, 2 Hughes, 227, s. c. 21 Fed. Cas. 1314*, decided by the Circuit Court for the Western District of North Carolina in October, 1875, Judge Bond said:

"This is a motion on the part of creditors to set aside an application for the allowance of a homestead exemption out of property incumbered by judgments upon debts created antecedent to the adoption of the constitution of North Carolina, which provides for that exemption. It seems to me that this application is similar to that in *Gunn* v. *Barry*, 15 Wall. (82 U. S.) 610, which was made under a like provision in the Constitution of Georgia, and which the supreme court declared with some emphasis could not be allowed; and it is precisely the *Case of Dillard (Case No. 3,912)*, decided in the Eastern district of Virginia. The act of congress of March 3, 1873, which was passed, as is maintained at bar, to overrule the decision of *Gunn* v. *Barry* (*supra*), and to make the homestead exemption paramount to the liens of antecedent judgments, was, by the same court, Chief Justice Waite delivering the opinion, in *Deckert's Case* (*Case No. 3,728*), declared to be unconstitutional. The application on the part of the bankrupt must be refused, and the motion to set aside granted."

In *Re Duerson, 13 Nat. Bank Reg. 183, s. c. 7 Fed. Cas. 1166*, it was held that Congress, in adopting the exemption laws of a State as part of the bankrupt law, cannot dispense with any of the limitations imposed by that law as interpreted by the State laws; and that under the laws of Kentucky an exemption of land cannot be allowed as against debts contracted before its acquisition. The opinion of Chief Justice Waite *In Re Deckert*, and that of Judge Bond *In Re Dillard*, were followed.

To the same effect is *In Re Kerr, 9 N. B. R. 566, s. c. 14 Fed. Cas. 386.*

Although none of these cases was ever passed upon by this Court, the opinion of Chief Justice Waite in *Re Deckert, supra*, was approved in *Hanover National Bank* v. *Moyses, 186 U. S. 181*, where, after quoting therefrom (*pp. 189-191*), Chief Justice Fuller said:

"We concur in this view and hold that the [bankruptcy] system is, in a constitutional sense, uniform throughout the United States, when the trustee takes in each State *whatever would have been available to the creditors if the bankrupt law had not been passed.* The general operation of the law is uniform although it may result in certain particulars differently in different States."

As further bearing upon this proposition, attention is called to the following additional authorities.

The lien of a judgment before bankrupt proceedings are commenced upon land set apart as exempt therein is not affected by the discharge in bankruptcy, where the judgment creditor did not prove his debt or submit it to the jurisdiction of

the bankruptcy court, and the land is subject to sale on execution thereunder.

Jackson v. *Allen*, *30 Ark. 110.*
Ward v. *Huhne*, *16 Minn. 159.*
Fehley v. *Barr*, *66 Pa. St. 196.*

It is no defense to an action to foreclose a mortgage that the mortgaged premises were allotted to the mortgagor as a homestead by proceedings in the bankruptcy court.

Brady v. *Brady*, *71 Ga. 71.*
Brown v. *Hoover*, *79 N. C. 40.*

IV.

The fact that the sale under the Tharp judgment occurred after the death of Godfred Keener, does not affect its validity.

In *Brooks* v. *Rooney*, *11 Ga. 423*, *s. c. 56 Am. Dec. 430*, in an action of ejectment by the heirs at law of Martin Brooks, deceased, it appeared that the defendants' title was derived from a sheriff's sale of the land, as the property of Martin Brooks, and that at the time of the levy and sale Brooks was dead. There was no representation upon his estate, and his heirs were all minors. It was claimed that this fact rendered the sale void. The court, however, reached a contrary conclusion, Mr. Justice Lumpkin saying:

"The last exception is, that Martin Brooks, the defendant in execution, died after the judgment

and after the *fi. fa.* had issued, but before the levy, and that the heirs at law were *minors* at the time, and that there was no representative upon his estate.

It is conceded, that at *common law* the *fi. fa.* could proceed, notwithstanding the death of the defendant. But it is concluded, that by the statutes of this State, a defendant, after execution has issued, has the right by affidavit of illegality, to arrest the progress of the *fi. fa,* for any irregularity; to point out what portion of his property shall be seized by the officer, in satisfaction of the debt; to sue for and recover the difference between the price bid at the first and second sales, in case of non-compliance by the purchaser with the terms; that he is entitled to notice of the levy, if it be on land, as in the present case; and to appear in court and superintend personally, the proper appropriation of the money arising from the sales. That inasmuch, therefore, as there is something which the defendant may do to protect his interest, that either the defendant himself, must be in life, or legally represented, provided he is dead, before the process can be enforced.

But is there nothing which may be done in England, after the execution has issued, to arrest its progress? What was the object of the writ of *audita querela*, but to be relieved from a judgment or *execution*, for some injustice of the party who obtained it? It is true, that the summary remedy by *motion*, has superseded mainly this ancient process. Still the change as to the mode of relief, does not weaken the force of the reply, that at Common Law, no less than by the Statutes of this State, the defendant in execution has the right to be relieved from the wrongful acts of the opposite party.

It is manifest then, that it will not do to rest this proposition upon the ground occupied by counsel. To change the Common Law in this respect, we are clear, would require the interposition of the Legislature. It can only be done by Statute. The argument to be deduced from the

Statutes already of force, and to the provisions of which I have adverted, constitutes, in our opinion, no such case of repeal by necessary implication, as would authorize this Court to make the change."

V.

It is respectfully submitted that the writ of error should be dismissed, or the judgment of the Supreme Court of Georgia, affirmed, with costs.

LOUIS MARSHALL,
Counsel for Defendant in Error.